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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

The Washington Water Power Company,

Petitioner,

v.

Spokane Indian Tribe,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Docket No. 91-35000
VOLUME III

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The Washington Water Power Company, Project No. 2545-007

Opinion No. 117-A; Opinion and Order Denying Rehearing, Deferring Filing Obligation and Denying Oral Argument

(Issued October 4, 1983)

Before Commissioners: C. M. Butler III, Chairman; Georgiana Sheldon, A. G. Sousa and Oliver G. Richard III.

[Note: Opinion No. 117; Opinion and Order Affirming, with Modifications, the Initial Decision on Jurisdiction, issued April 8, 1981, appears at 15 FERC ¶ 61,039.]

On May 8, 1981, The Washington Water Power Company (WWPC) filed an application pursuant to Section 313(a) of the Federal Power Act (FPA) and § 1.34 (now Rule 713) of the Commission's Rules of Practice and Procedure for rehearing of Opinion No. 117 issued April 8, 1981, in which (1) it was found that WWPC has a valid permit granted prior to June 10, 1920, to *occupy* lands of the Spokane Indian Reservation and *utilize*

waters of the Spokane River for its Little Falls hydro-electric development, and (2) WWPC was ordered to apply for a license under the FPA for the continued operation and maintenance of the works of that development for want of similar authority to *occupy* the waters and thereby operate and maintain its dam in the river. WWPC included a motion for a stay in its application and, concurrently, filed a separate motion for oral argument. Upon consideration of the filings, we are denying rehearing and the motion for oral argument, and deferring the filing obligation. In addition, and partly on our own initiative, we are also modifying certain parts of the Opinion.

Navigability

Section 1.31(c)

The navigability of the Spokane River was an issue in this proceeding through the Initial Decision, in which the

presiding administrative law judge concluded,

> The evidence, taken in its entirety, is sufficient to establish navigability under § 3(8) of the Federal Power Act . . . It is therefore found that Little Falls Dam is situated on a "navigable water of the United States."

WWPC said in its brief on exceptions that its Issue No. 5 was,

> Is the Spokane River a navigable water of the United States under the Federal Power Act and for all other purposes?

And WWPC argued, in pertinent part, as follows:

> . . . If WWPCo were contemplating building a new project at the Little Falls site, there is little doubt that the Company would be required to obtain a license for such project under the Federal Power Act and that the Spokane River would be considered to be a navigable water of the United States as defined by Section 3(8) of the Federal Power Act. WWPCo does not take exception to a finding that the Spokane River constitutes navigable water as

> defined in Section 3(8) of the Federal Power Act.
>
> WWPCo does take exception to any conclusion or finding that the Spokane River, at the Little Falls site, is considered to be a navigable water of the United States for any other purpose . . .

Opinion No. 117 does not address the interaction of the evidence and the cases on navigability. Instead, it invokes Section 1.31(c) of the Commission's Rules of Practice and Procedure which states, in pertinent part,

> . . . Objections to any part of an intermediate decision which is not the subject of exceptions may not thereafter be raised before the Commission . . .in an application for Commission rehearing, and shall be deemed to have been waived.[1]

In so invoking Section 1.31(c), Opinion No. 117 says that the concern in this proceeding with respect to the navigability of the Spokane River pertains only to navigability within the purview of

the definition contained in the Federal Water Power Act (FWPA) and the FPA.

WWPC contends in its Error No. 1 in its application for rehearing that it "has not waived or admitted any *fact* concerning the issue of navigability", and that it conceded in its brief on exceptions that if it were constructing a new project "the Spokane River would probably be considered to be a navigable water of the United States as defined by Section 3(8) of the FPA."

Opinion No. 117 does not say that WWPC waived or admitted any fact pertaining to the issue of navigability. It says, instead, that the legal operative effect under Section 1.31(c) of WWPC's failure to except to the issue of navigability, was waiver of *further objections* to that issue. We have again considered WWPC's argument in its brief on exceptions in the light of its application

for rehearing, and we find that the invocation of Section 1.31(c) was fair and consistent with our practice. If WWPC had in fact excepted to the judge's determination that the Spokane River is navigable at Little Falls within the purview of Section 3(8), it would have attempted to explain why his rationale and conclusion were wrong in the light of the evidence and the relevant cases. WWPC did not do that, but argued, instead, that the judge's determination that the river is navigable pertained only to Section 3(8). By implication, WWPC argued that his determination did not pertain to the Rivers and Harbors Appropriation Act of 1899.

Navigability Under the Federal Power Act

Although Opinion No. 117 does not err insofar as it invokes Section 1.31(c), this Opinion No. 117-A will address the navigability of the Spokane River (1) to

show that the judge's conclusion is supported by the record and, therefore, that the invocation of that provision was not arbitrary, and (2) to explain why WWPC should have obtained the approval of Congress *and* the Secretary of War before constructing the Little Falls dam, or, at a minimum, the approval of the Secretary of War. As discussed below, we have concluded that the Spokane River is navigable at Little Falls under common law principles as well as within the purview of the FPA.

The Spokane River is the outlet of Coeur d'Alene Lake, in Idaho, and, until 1942, flowed 111 miles in a westerly direction into the Columbia River, in Washington, upstream from the "Big Bend" where the Columbia turns from a southerly to a westerly direction. In 1942 the Grand Coulee dam was completed below the confluence of the Spokane and Columbia

rivers, and the waters of the Columbia River were impounded to form the 151-mile-long Franklin D. Roosevelt Lake, which is a navigable waterway. At the same time, the Corps of Engineers began to consider the Spokane River as being navigable from its mouth to the Little Falls development (Exhibit No. 103) since one branch of that lake extends almost 30 miles up the Spokane River to the tail race of that development. Indeed, WWPC later received a favorable settlement in a law suit (Exhibit No. 131) that it initiated on the ground that the backwaters of the Grand Coulee dam flooded the tail race of the Little Falls development and thereby impaired its electrical output under certain conditions. In other words, the Spokane River now exists below Little Falls as a branch of the navigable Franklin D. Roosevelt Lake.

Today, WWPC is required by the first sentence of Section 23(b) of the FPA to have a permit or license to operate and maintain the works of its Little Falls development for the following reasons, each of which itself subjects the works of that development to our licensing jurisdiction: (1) The tail race of that development is occupying part of a waterway that is navigable in fact and, therefore, is a "navigable water" within the definition contained in Section 3(8) of the FPA. (2) The tail race of that development is occupying part of a stream that has "been authorized by Congress for improvement by the United States" as part of the Grand Coulee development and, therefore, it is occupying part of a waterway that is navigable in law within the purview of the same definition.[2] (3) The approximate five-mile reach of the Little Falls development is occupying part

of a stream that consists of interrupting falls, shallows, or rapids, situated between the navigable-in-fact backwaters of the Grand Coulee dam, and WWPC's own navigable-in-fact Long Lake impoundment less than five miles upstream from the Little Falls dam and, therefore, it is occupying part of a waterway that is navigable in law within the purview of the same definition. Long Lake is about 20 miles long (Exhibit 105), has a depth of 24 feet (Exhibit No. 107), and is one of the impoundments that is licensed as part of WWPC's Project No. 2545.[3] Therefore, the record supports the judge's conclusion that the Spokane River at Little Falls, today, is a navigable water of the United States within the purview of Section 3(8) of the FPA.

The first sentence of Section 23(b) of the FPA prohibits, in the absence of a permit or a license, the present operation

and maintenance of facilities constructed in the past, as well as the present construction of facilities, in and along navigable waters of the United States. Therefore, since WWPC concedes that the Spokane River is navigable within the meaning of Section 3(8) with respect to facilities that would be constructed presently, it would seem to concede in law that the river is navigable within the meaning of that section with respect to facilities that were constructed in the past and presently must be operated and maintained.

In addition, WWPC's concession in its application for rehearing that its Little Falls development is operated in hydraulic coordination with all of its licensed hydro-electric developments on the Spokane River (*see, also*, Opinion No. 117, at 1), is sufficient to require licensing of the works of that development as part of a

single "project" as defined in Section 3(11) of the FPA, even if the river is *not* navigable at Little Falls, if it is navigable in any reach occupied by Project No. 2545, or if any works of that project are otherwise required to be licensed.[4] We are satisfied, in this connection, that the evidence discussed in the Initial Decision, beginning at 24, establishes the historic use of the Spokane River as a highway for sawlog commerce from its source in Idaho, at least as far downstream as Spokane, Washington, and hence its historic navigability in fact in that reach which is occupied by several developments of WWPC's Project No. 2545.[5]

Navigability Under Common Law Principles

Furthermore, the Spokane River is navigable at Little Falls under common law principles even though the record contains evidence to establish that the Corps of Engineers and others did not consider the

Spokane River to be navigable prior to 1942, at least in some reaches along the southern boundary of the Spokane Indian Reservation.

The generally accepted definition is contained in *The Daniel Ball*, 77 U.S. 557 (1871), at 563 (emphasis added):

> . . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or *are susceptible of being used, in their ordinary condition*, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form *in their ordinary condition* by themselves, or by uniting with other waters, a continuous highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Supreme Court added in *The Montello*, 87 U.S. 430 (1874), at 441:

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway . . .
>
> * * * *
>
> The learned judge of the court below rested his decision against the navigability of the Fox River . . . chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation . . . [T]he rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break . . . [T]he vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although

> its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars.

And the Supreme Court amplified and refined those decisions in *United States v. Appalachian* Electric Power Co., 311 U.S. 377 (1940), and said at 407-9 (footnotes omitted):

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. "Natural and ordinary condition" refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken . . . The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful. When once found

> to be navigable, a waterway remains so . . .
>
> . . . It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce. In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.

We can understand that those who considered the lower part of the Spokane River to have been not navigable prior to 1942 may not have envisioned the feasibility of a multiple purpose development of the magnitude of Grand Coulee, which is the largest concrete structure in the world in terms of cubic content.[6] The fact remains, however, that Grand Coulee is in place. And, therefore, in conformity with *Appalachian*, in determining the navigable character of the Spokane River at Little Falls, it is

proper to consider the feasibility of interstate use after the improvements which have been made. They were authorized by Congress and must, therefore, be deemed in law to have been reasonable.

On the basis of 40-year data from July 1928 through June 1968 (Exhibit No. 136), the average median monthly flow at Little Falls is 7,159 cubic feet per second (cfs), ranging from a median low of 1,865 cfs in September to a median high of 19,700 cfs in May. And on the basis of 5-year data from 1973-74 through 1977-78 (Exhibit No. 137), the surface elevation of Franklin D. Roosevelt Lake is maintained *at or above* the elevation of the tail race of the Little Falls development about half of the time (Exhibit No. 105).[7] Therefore, there is normally little or no surface gradient from the Little Falls development to the

Spokane River branch of Franklin D. Roosevelt Lake.

We conclude that the volume and regularity of the flow of the Spokane River at Little Falls, and the gradient, are such that the Spokane River branch of Franklin D. Roosevelt Lake is susceptible of being used in its improved condition as a highway for commerce from the mouth of the Spokane River at least to the Little Falls development. And we find that the Spokane River is navigable at Little Falls under the common law definition contained in *The Daniel Ball*, as amplified and refined in *Appalachian*.

The Occupation of the River Requires the Consent of Congress

When the Little Falls development was being constructed, the Spokane River was "susceptible of being used" in its present improved condition as a highway for commerce from its mouth to Little Falls,

and, therefore, was navigable "within the meaning of the acts of Congress" (both quotes, from *The Daniel Ball*), including the Rivers and Harbors Appropriation Act of 1899. We emphasize, however, that the Grand Coulee development merely *proved* that the river is susceptible of such use by backing up the lower reaches to form a lake, which became one of a series of lakes, moving upstream. Essentially the same situation would have come about even if the Grand Coulee development had not been built.

As shown by Exhibit No. 159, a Lieutenant Symons, of the Corps of Engineers, entered the mouth of the Spokane River in 1881 and proceeded to Camp Spokane about 1-1/2 miles upstream, which establishes that the river was then navigable to that point. Camp Spokane became Fort Spokane, and the site was later permitted to the Big Bend Transit

Company under the Act of March 3, 1905, for a hydro-electric development that would have included a dam with a crest at an elevation of 1,179 feet m.s.l.,[8] 110 feet below the Grand Coulee dam. Although a smaller lake with a lower surface elevation would have been formed in the lower reaches of the Spokane River, it would nonetheless have become one of a series of lakes establishing the navigability of that part of the river.

In 1892, 11 years later, Captain Symons made a preliminary examination of the other end of the Spokane River between Coeur d'Alene Lake and Post Falls, Idaho, and described the river in his report:

From the lake to Post Falls there are no rapids or bed rock to interfere with navigation, the river flows over a bed of gravel and boulders, and has a general depth at low water of about 3 feet. Just at the head of the river, at the lake,

there is a bar upon which the navigable depth is reduced to probably 2 feet at low water, and part way down is another bar upon which is an equal depth.[9]

Section 9 of the Rivers and Harbors Appropriation Act of 1899[10] made it unlawful to construct or commence the construction of any bridge or dam, among other structures, over or in any navigable river of the United States, until the consent of Congress was obtained, and the plans were approved by the Chief of Engineers and the Secretary of War. A proviso said that when the navigable portions of a river were wholly within a single State, the consent of a State legislature would be required, but the plans would nonetheless have to be approved by the Chief of Engineers and the Secretary of War.

Section 9 is best understood in the light of Sections 4 and 7 of the Rivers

and Harbors Appropriation Act of 1890, 26 Stat. 426, which prohibited the construction of bridges and dams, among other structures, that obstructed navigation in navigable waters, unless approved by the Secretary of War:

> In 1899 the terms of this prohibition were enlarged, and every [bridge and] dam on or across a navigable stream, whether actually navigable at the point in question or not, and independently of the fact whether such structure interfered with actual navigation, was prohibited "until the consent of Congress to the building of such structure shall have been obtained, and until" the plans for the same are approved by the Chief of Engineers and the Secretary of War."

Section 13 of the Rivers and Harbors Appropriation Act of 1899 prohibited the discharge of refuse into navigable waters of the United States, "or into any tributary of any navigable water from which the same shall float or be washed

into such navigable water . . . " In 1900, a United States marshal filed a complaint against the Spokane & Idaho Lumber Company for violating Section 13 by allowing sawdust and other refuse to enter the Spokane River, which was said to be a navigable stream (Exhibit No. 133). And in 1905 the Secretary of War approved a bridge over the Spokane River near Coeur d'Alene, Idaho.[12] Accordingly, the Spokane River was treated by Federal authorities as being navigable for the purpose of administering the Rivers and Harbors Appropriation Act of 1899, even before the Little Falls development was constructed.

Since the Spokane River was used as a highway for saw-log commerce from Coeur d'Alene Lake, Idaho, to Spokane, Washington, as discussed by the judge, it was clearly navigable in more than one State and, therefore, WWPC was required by Section 9 of the 1899 statute to obtain

the consent of Congress for the construction of the Little Falls dam, whether or not the river was navigable at Little Falls.[13] WWPC's failure to do so left it vulnerable to obtaining such consent either in the form of a permit issued under the Act of March 3, 1905, if that Act empowered the Secretary of the Interior to authorize the construction of dams across the river, or a license amendment to be issued under the FPA.

The Act of March 3, 1905, was a modification and enlargement of the Act of February 15, 1901 (31 Stat. 790), insofar as concerned the Spokane Indian Reservation.[14] The earlier Act empowered the Secretary of the Interior to permit the use of rights-of-way through public lands and reservations of the United States

> . . . for electrical plants, poles, and lines for the generation and distribution of

> electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits, and for water plants, *dams*, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder . . . *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. [Emphasis of "dams" added.]

Section 1 of the Act of March 3, 1905, authorized the acquirement of the right to use the waters of the Spokane River along the southern boundary of the Spokane Indian Reservation by

appropriation under and pursuant to the laws of the State of Washington. Section 2 empowered the Secretary of the Interior to grant such appropriators land on the reservation

> . . . such as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical, or power plants, *dams*, wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water . . . [emphasis added].

In the course of the debate, Congressman Jones, who sponsored the bill, was asked whether the Secretary of the Interior would be empowered to authorize dams across the Spokane River, and he replied,

> Oh, no; not at all. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.

In the absence of the legislative history, the Secretary of the Interior might appear to have been empowered by Section 2 to grant lands" . . . for the erection of suitable . . . dams . . . for the development of power . . . " and, by implication, to authorize the construction of dams across the Spokane River. But the legislative history casts a different light on that authority. The word "dams" apparently was included in Section 2 because it was included in the Act of February 15, 1901,[15] and because the works of hydroelectric developments ordinarily include dams. But, as noted in Opinion No. 117, some hydro-electric developments have dams that are completely off the waterways that provide their energy.

Congressman Jones said that the Act of March 3, 1905, was reported from the Committee on Indian Affairs, and that it simply affected Indian lands. His

statement that matters pertaining to damming the Spokane River would have to go to the Committee on Interstate and Foreign Commerce, should be read in the light of Section 9 of the 1899 statute, and the fact that an act of Congress was then required for every dam on a stream that was navigable in two or more States, whether or not it was navigable at the site of the prospective dam. Since Congressman Jones knew that the War Department had investigated the navigability of the Spokane River, presumably meaning the Symons excursions, he apparently knew that the Department was treating the upper reaches of the river as being navigable for the purpose of administering the 1899 statute. And we understand his statement as meaning that prospective builders of dams under the Act of March 3, 1905, would have to take their chances on obtaining Congressional

approval under the 1899 statute to occupy the waters of the Spokane River.

In this respect, we do not agree with the *Big Bend* decision wherein the United States was required to pay condemnation damages for lands that had been permitted under the Act of March 3, 1905, on the basis of their value as a power site, rather than their lower value for agricultural purposes. The District Court (1) assumed that the Spokane River was navigable at the Fort Spokane site, which was a short distance above its confluence with the Columbia River (42 F.Supp., at 463), (2) conceded that the intent of Congress would prevail in interpreting the Act of March 3, 1905 (at 466), (3) considered the legislative history of that Act (at 467), and (4) proceeded through its opinion without challenge to its premise that the Secretary of the Interior was empowered to authorize the

construction of dams in the river. The court said, in this connection, at 464, that the defendant filed an application "to secure from the Secretary of the Interior" the right, among others, to erect a 60-foot dam, and that the latter demanded a higher dam to make full use of the power potential.[16] Although the Court issued its decision in 1941, six years after the FWPA became the FPA, it addressed the first paragraph of Section 23 of the FWPA, rather than Section 23(a) of the FPA.[17] And the Court said, at 471, that since the defendant had "a valid and existing right of way and a claim of authority theretofore given pursuant to law, it follows necessarily that that right of way grant or authority was not affected by any of the provisions of the Power Act."[18] Accordingly, the Court allowed power site values on an unchallenged premise, with which we do not

agree, that the permit included authority to dam the river.

In summary, the Spokane River was used in Idaho and Washington for floating sawlogs and, consequently, (1) it was navigable in fact in both States under the principles of *The Daniel Ball*, and (2) WWPC was required by Section 9 of the Rivers and Harbors Appropriation Act of 1899 to obtain the consent of Congress for building the Little Falls dam, whether or not the river was navigable at Little Falls. Congress did not grant such consent in a special act, or delegate to the Secretary of the Interior authority to grant such consent under the Act of March 3, 1905; and, as a result, WWPC is now required by Section 23(b) of the FPA to obtain from the Commission the consent of Congress to continue to operate and maintain that dam. Under such circumstances, WWPC is not being denied

any constitutional or other rights since it should have obtained the consent of Congress before building the dam, in which case Section 23(a) of the FPA would have allowed WWPC to continue to utilize that authority.

Whether or not the Spokane River was navigable in fact or considered navigable in fact at Little Falls when the Little Falls development was constructed, or was proved to be navigable in fact at that site when the Grand Coulee development was constructed, the river unquestionably is navigable in fact and in law at Little Falls today and, therefore, WWPC must have the consent of Congress to continue to operate and maintain the Little Falls dam. WWPC did not obtain the consent of Congress under the Rivers and Harbors Appropriation Act of 1899 (whether or not it was required to do so) or under the Act of March 3, 1905, to occupy the river at

that site and, therefore, WWPC must now obtain the consent of Congress to do so pursuant to the Federal Power Act. As the Supreme Court said in *Appalachian*, *supra*, 311 U.S., at 424, the power of Congress to regulate commerce is so unfettered that it may make the maintenance of a structure in a navigable water dependent upon a license, and Congress has done so through Section 9 of the Rivers and Harbors Appropriation Act of 1899 and Section 4(e) of the FPA.

WWPC's Permits

Opinion No. 117 finds, at 23 and 24-25, that WWPC is able to operate and maintain the Little Falls development under and in accordance with the terms of the permit granted by the Secretary of the Interior to WWPC on August 29, 1908, insofar as involves the 100 acres that were granted to David Wilson (Wilson) on November 3, 1906, and assigned to WWPC on

July 8, 1907. And it concludes, at 26, that the payment of annual charges for the use, occupancy and enjoyment of project lands that WWPC has an existing right to use, occupy and enjoy for the development of water power under the terms of its pre-FWPA permit, is a burden of project lands that is not properly imposed on WWPC as being inconsistent with the terms of that permit.

The exemption from annual charges was premised on the requirement in Section 3 of the Act of March 3, 1905, that a permittee make a one-time payment for the right to utilize reservation lands indefinitely for the development of water power, as long as the lands are so used, and on the requirement in Section 23(a) of the FPA that the other provisions of the FPA shall not be construed as affecting the authority to so utilize the lands thereunder. Having paid once for the right

of present utilization, a pre-FWPA permittee should not be required to pay a second time in the form of annual rents.

Upon further consideration, the rationale breaks down as to the 100 acres because Section 3 of the Act of March 3, 1905, contemplates payment "by said applicants" for permits, and because Wilson rather than WWPC was the applicant for the 100 acres. WWPC paid Wilson, and Wilson paid the Secretary of the Interior for the benefit of the Spokane Indians. Hence, the rationale that WWPC should not be required to pay twice for the right of present utilization should be premised on a transfer of Wilson's 1906 permit to WWPC, rather than an interpretation of the scope of WWPC's 1908 permit as including the 100 acres.

The Act of March 3, 1905, and the Secretary of the Interior's regulations thereunder, were silent as to transfers.

Permits granted under that Act were personal to the permittees (Opinion No. 117, at 24), and no application to transfer the 1906 Wilson permit to WWPC was filed with the Secretary of the Interior. Nonetheless, WWPC informed the Secretary of the Interior of the transfer and did everything necessary to obtain a permit for itself. And, as discussed in Opinion No. 117, at 24,

> there can be no doubt that on August 29, 1908, Interior approved WWPC's utilization of the entire 108 acre tract for a water power development.

A better rationale is to treat the Secretary of the Interior's action of August 29, 1908, as an after-the-fact authorization of the transfer of the 1906 Wilson permit to WWPC,[19] as well as a grant of a permit to WWPC, on the equitable principle that the Commission should regard as being done that which ought to have been done. *See The Montana*

Power Company v. Federal Power Commission, 330 F.2d 781 (9th Cir. 1964), at 788.

On August 29, 1908, the Secretary of the Interior knew that the Little Falls development was under construction and that the entire 108 acre tract was being utilized. Therefore, it was incumbent upon him to take whatever action was necessary to stop further construction, or to provide any necessary authorization within his power. We think that the Secretary of the Interior, in fairness to WWPC, should have suggested the filing of an application for approval of the transfer of the 1906 Wilson permit, which he should have considered with WWPC's application for a permit, and thus avoided the technical problem that has arisen.[20]

We now find and conclude, in lieu of the finding in Opinion No. 117, at 23 and 24-25, and n. 29 at 21, that WWPC is able to operate and maintain its Little Falls

development under and in accordance with the terms of the permit that was granted to Wilson on November 3, 1906, and transferred to WWPC on July 8, 1907, as authorized by the Secretary of the Interior on August 29, 1908, insofar as involves the 100 acres. For convenience, that permit and the one that was granted directly to WWPC on August 29, 1908, will be referred to as WWPC's 1906 and 1908 permits, respectively.

In this connection, Opinion No. 117 is modified in the following respect:

The Opinion finds in the first paragraph, and states elsewhere, that WWPC has authority under its 1908 permit to utilize waters "on the reservation side of the river" for the development of water power. That notion was derived from Congressman Jones' statement that, "This bill simply authorizes the acquirement of water rights on the reservation side of

the river under the laws of the State of Washington . . . " However, Exhibit No. 1 establishes that the southern boundary of the Spokane Indian Reservation is the southern bank of the Spokane River and, therefore, "the reservation side of the river" was the entire width of the river. We now find, in lieu of the finding in Opinion No. 117, at 1, that WWPC has authority under two permits granted prior to June 10, 1920, to occupy lands of the Spokane Indian Reservation and utilize waters of the Spokane River to continue to operate and maintain its Little Falls hydro- electric development. But we continue to find, as stated, that WWPC's authority thereunder is insufficient to continue to do so without having a license issued under the FPA.

Sections 23(a) and 23(b)

New Construction v. Existing Works

WWPC contends in its Error No. 2 that the first sentence of Section 23(b) of the FPA prohibits only the construction of project works without a permit or license, notwithstanding the express language, "It shall be unlawful . . . to construct, operate, or maintain . . . " Therefore, the Commission does not have authority under Section 23(b), according to WWPC, to require licensing of the Little Falls development.

As more fully discussed in Opinion No. 2 issued October 28, 1977 (*Puget Sound Power and Light Company*, Project No. 2494) [1 FERC ¶ 61,059],[21] Section 23 of the FWPA consisted of two paragraphs. In 1935 the first paragraph was reenacted without substantive change as Section 23(a) of the FPA, the pertinent part of which is reproduced in Opinion No. 117, at 4. At

the same time, the second paragraph was reenacted with two substantive changes as Section 23(b). One substantive change consisted of a new first sentence[22] which is reproduced in Opinion No. 117, at 2. The other consisted of changing the words "may in their discretion" in the former second paragraph of Section 23 to "shall before construction," thus changing the tenor of the provision from discretionary to mandatory. Persons intending to construct dams or other project works in *non-navigable* waters within the jurisdiction of Congress were thus *required* to file declarations of intent with the Commission to enable the Commission to determine whether such works would be jurisdictional by reason of affecting commerce.

Since the portion of Section 23(b) of the FPA that is the former second paragraph of Section 23 of the FWPA

addresses only proposals to construct project works, and since the explanation of the first sentence of Section 23(b) of the FPA uses only the word "construct" and a derivative (to the exclusion of "operate" and "maintain"), WWPC contends that the first sentence of Section 23(b) addresses only new construction, to the exclusion of existing project works. WWPC bases its contention on the explanation of Section 210 of the Public Utility Act of 1935, which amended Section 23 of the FWPA, that is contained in Senate Report No. 621, 74th Congress, 1st Session, at 47, and is reproduced in part in Opinion No. 117, at 22, n. 31.[23] The complete explanation is reproduced below with (1) the emphasis added by WWPC and (2) the last sentence omitted by WWPC:

This section also amends the second paragraph of Section 23, dealing with the

filing of declarations of intention, and makes this paragraph subsection (b) of the section. Under the present provision anyone intending to undertake a project on a nonnavigable tributary of a navigable stream may in his discretion file such a declaration with the Commission. If the Commission finds that the interests of interstate commerce would be affected by the project, it is made unlawful to proceed without having secured a license. This provision is changed to make the filing of a declaration of intention mandatory in such cases. Furthermore, a provision is inserted expressly making it unlawful to *construct* a project on any navigable waters without a license granted pursuant to the act. *This latter provision is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act.* [24]

> It is thought desirable to bring together in a single act the positive requirements regarding the *construction* of water-power projects. Under this subsection with the two amendments here made every person *intending to construct a project* which might conceivably affect any navigable waters would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern. [Emphasis added by WWPC.]

WWPC does not explain why the words "operate" and "maintain" should be read out of the first sentence of Section 23(b). Nor does WWPC explain the last sentence that it omitted, which appears to require the Commission to assert jurisdiction over project works in and along navigable waters and on public lands and reservations, to the full extent of the authority delegated to the Commission.

WWPC emphasizes the sentence that explains that the first sentence of Section 23(b) "is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act." Section 9 of the Rivers and Harbors Appropriation Act of 1899, which is codified as 33 U.S.C. § 401 and is reproduced in Opinion No. 117, at 19, n. 26, prohibits the construction and the commencement of construction of bridges, dams and other facilities in navigable waters without the consent of Congress, but does not expressly prohibit the operation or maintenance of such facilities. Similarly, Section 10, which is codified as 33 U.S.C. § 403, prohibits, among other things, the creation of unauthorized obstructions to the navigable capacity of waters of the United States, without also expressly prohibiting the operation or maintenance of such obstructions. In 1925, ten years

before Congress amended Section 23 of the FWPA, the Supreme Court held that Section 10's prohibition against the creation of unauthorized obstructions, also applied to the maintenance of such obstructions.[25] Congress amended Section 23 in 1935 and, consistent with the foregoing Supreme Court interpretation, included the words "operate" and "maintain" in the first sentence of Section 23(b). And five years later, in 1940, the Supreme Court suggested that Section 9's prohibition against the construction of dams and other facilities without the consent of Congress, also included the maintenance of such facilities. The Supreme Court said, in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), at 424:

> Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or *maintenance* of a structure in a navigable

> water dependent upon a license. *This power is exercised through § 9 of the Rivers and Harbors Act of 1899 prohibiting construction* without Congressional consent and through § 4(e) of the present Power Act.

The House Report, *supra*, in common with the Senate Report, *supra*, spoke only of the construction of facilities or projects, as WWPC says. But the House Report, unlike the Senate Report, also addressed the matter of permits granted prior to June 10, 1920. Since Congress was embodying the prohibitions of the 1899 statute in the water power statute, it is highly unlikely that in 1935 the House Report was addressing the construction-only of dams that had been authorized by permits granted at least 15 years earlier. Virtually all of the dams impliedly or expressly authorized by pre-FWPA permits would then have been built. We think that the House and Senate

reports were addressing the ongoing operation and maintenance of those and other dams, as well as the prospective construction of all non-government water power dams in navigable waterways under existing and future licenses, including any unconstructed dams under outstanding pre-FWPA permits. And we think that the reports were saying that the *1899 statute*, in common with the 1935 statute, prohibits ongoing operation and maintenance activities as well as initial construction activities.

We therefore reject WWPC's contention that the first sentence of Section 23(b) addresses only new construction, to the exclusion of existing project works.

Scope of Section 23(a)

Section 23 of the Administration Bill, which was introduced in the 65th Congress, 2nd Session, as H.R. 8716, began as follows:

> Sec. 23. That the provisions of this Act shall not be construed as revoking any permit or valid existing right of way heretofore granted, or as revoking any authority heretofore given pursuant to law . . .

The provision was not changed, and the bill as agreed to in conference was introduced in the 66th Congress, 1st Session, as H.R. 3184. In the Senate, the Committee on Commerce changed the word "revoking" to "affecting" in two places, to make the provision read,

> Sec. 23. That the provisions of this act shall not be construed as ~~revoking~~ *affecting* any permit or valid existing right of way heretofore granted, or as ~~revoking~~ *affecting* any authority heretofore given pursuant to law . . .

WWPC claims in its Error No. 4 that these changes were "an apparent attempt on the part of the Committee on Commerce to broaden the exemption" from licensing and, consequently, the Commission erred in its application of Section 23(a).

Upon reconsideration, we have concluded that Congress intended that the FWPA would neither diminish nor enlarge rights under pre-FWPA permits, and that Opinion No. 117 errs in applying the present Section 23(a) too broadly, rather than too narrowly as claimed by WWPC. Although Section 23(a) protects property rights incident to the ongoing authority of pre-FWPA permits to operate and maintain hydro-electric developments, it does not address property rights incident to the transfer of hydro-electric developments in connection with relicensings and takeovers, other than as expressly set forth in the proviso.

Senate Report No. 180, 66th Congress, 1st Session, dated September 12, 1919, discussed several of the changes made by the Committee on Commerce, and said with respect to the others, including the foregoing changes, "Most of the amendments

recommended are of a minor character and largely make more clear and certain the meaning of the House provisions."

As more fully discussed in Opinion No. 88 (*City of Bountiful, Utah, et al.*, Docket No. EL78-43) [11 FERC ¶ 61,337], at mimeo p. 28, H.R. 3184 was accompanied in the Senate by S. 152, a bill that had been introduced by Senator Jones, Chairman of the Committee on Commerce (who as a Congressman sponsored the Act of March 3, 1905). On June 25, 1919, Gifford Pinchot (Pinchot), who was then President of the National Conservation Association, wrote to Senator Jones suggesting a number of changes for Senator Jones' S. 152. Among them, Pinchot suggested changing "revoking" to "affecting" in two places as part of a larger revision to make sure that revocable permits would not be enlarged by the courts into perpetual grants:

> The first paragraph of Sec. 22, of your bill, seems intended to save existing rights under permits now outstanding, if the permittees do not elect to take out a license under the new law. It is clear that if such rights are not to be diminished by the new law neither should they be enlarged; but the provision that the holders "may retain the same, subject to the conditions set forth in the grant thereof and" to the regulations now in force gives ground for contention, and perhaps for a ruling by the courts, that would change the outstanding permits (many of which are by existing law expressly made revocable at the discretion of the issuing authority) into grants of perpetuity. We therefore deem it vital that said first paragraph be amended as follows: Strike out the word "revoking" in both places where it occurs in lines 21, and 32, on page 30, of your bill, and substitute therefor in each place the word "affecting" . . .

Although the first paragraph of Section 23 of H.R. 3184 did not contain most of the language that Pinchot found objectionable in Senator Jones' S. 152, it

did contain the language that included the word "revoking" in two places. As indicated, Senator Jones' Committee on Commerce changed the word "revoking" to "affecting" in both places in H.R. 3184, and the Senate passed H.R. 3184 as so changed on January 17, 1920.

Thereafter, the Committee of Conference retained the changes of the Committee on Commerce, which were described in the Statement of the Managers on the Part of the House,[26] as "verbal changes." In other words, the word "affecting" in Section 23(a) of the FPA means "revoking"; and the change in terminology was verbal only, and not an enlargement or broadening of the first paragraph of Section 23, as WWPC claims.

In view of the fact that the Committee on Commerce adopted Pinchot's suggested change in language to the extent that it was applicable to H.R. 3184, we

have concluded, as indicated, that Congress intended that the FWPA would neither diminish nor enlarge rights under pre-FWPA permits. Consistent therewith, Opinion No. 117 does not diminish WWPC's rights under its 1906 and 1908 permits to continue to occupy lands of the Spokane Indian Reservation and utilize waters of the Spokane River for its Little Falls hydro-electric development. And it does not enlarge WWPC's rights thereunder by permitting WWPC to continue to operate and maintain its dam in the river and thus occupy the waters without obtaining a license as later required by the first sentence of Section 23(b).

Opinion No. 117 strikes a balance between preserving the authority of pre-FWPA permits, and refraining from enlarging that authority, consistent with current requirements.

Several of WWPC's allegations of error appear to be bottomed on loose language that invariably slips into briefs, as well as opinions and orders, to the effect that the Commission licenses hydro-electric projects, or, somewhat more specific but still loose, that the Commission licenses the construction, operation and maintenance of such projects or developments. WWPC contends, in this connection, in its Error No. 2, that Section 23(a) "exempts the Little Falls Development from licensing." That contention is inaccurate.

Section 23(a) is a grandfather provision that says, in substance, that the other provisions of Part I of the FPA shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or the authority thereunder. Therefore, the Commission must look to the terms of such

permits and the authority thereunder, and interpret those terms and that authority, to determine whether the continued operation and maintenance of an existing hydroelectric development is exempted thereunder from licensing, or whether less-inclusive continuing activities (if any) associated with an existing hydro-electric development are exempted thereunder from licensing.[27]

Opinion No. 117 states, at 26 and 27, that WWPC's permitted interest in the 108 acres and its permitted right to utilize 10,000 cfs of the flow of the Spokane River are property rights for which WWPC is entitled to "just compensation" in the constitutional sense if that interest and right are transferred to another in connection with a relicensing or takeover under the provisions of the FPA. Upon further consideration, we are persuaded that Opinion No. 117 is wrong in that

respect, and that WWPC would be entitled to the compensation specified in Sections 14(a) and 15(a) of the FPA, "actual legitimate original cost" "net investment," as in the case of *The Montana Power Company*, for its Holter water power development.

As more fully discussed in *The Montana Power Company*, 7 FPC 163 (1948), the Secretaries of the Interior and Agriculture on April 22, 1920, granted a permit to The Montana Power Company under the Act of February 15, 1901, to utilize certain lands of the United States for its Holter development on the Missouri River. The Holter dam had been constructed purportedly pursuant to a special statute enacted on April 12, 1906 (34 Stat. 111), but the Commission found in 1948 that it had been constructed in violation of the time limits of that statute and, consequently, that The Montana Power

Company had pre-FWPA authority to occupy lands but no such authority to occupy navigable waters. In this respect, the Little Falls development has precisely the same status as did the Holter development, which is the only other situation to our knowledge in which there was pre-FWPA authority to occupy lands but not waters. The Commission said, at 182,

> But it is clear that the Holter land permit did not, nor could it, authorize the occupancy of navigable waters of the United States. The 1901 land-permit statute contains no suggestion of such authority. It is a public-land, right- of-way statute, and no more. In addition, only a short time before, Congress had enacted the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1121, 1151) empowering the Secretary of War to approve the location of obstructions in navigable waters. The 1901 statute did not expressly repeal the 1899 statute, and there is no repeal by implication since no necessary conflict exists between the two. In short, each statute stands alone, and a

> grant under one confers no right obtainable under the other (cf. *United States v. Arizona*, 295, U.S. 174). [28]
>
> * * *
>
> Despite its admittedly valid permit to occupy public lands, which will continue unaffected, the Company lacks authority for its Holter dam located in a "navigable water," and is therefore required to apply for license under Part I of the Act.

The Commission was affirmed in relevant part in *The Montana Power Company v. Federal Power Commission*, 185 F.2d 491 (D.C. Cir. 1950).[29] Thereafter, the works of the Holter development were licensed as part of The Montana Power Company's Project No. 2188, and we take official notice of Article 33 of that license, which provided,

> *Article 33.* The actual legitimate original cost, estimated where not known, and the accrued depreciation of the parts of the project completed prior to the effective date of the license (December 1, 1948) shall be determined by the

> Commission as of such effective date, in accordance with the Act and the rules and regulations of the Commission, and such cost less such accrued depreciation, so determined, shall be the net investment in the project as of such effective date.

WWPC's permits issued November 3, 1906, and August 29, 1908, authorize the occupation of lands of the Spokane Indian Reservation and the utilization of the waters of the Spokane River for the development of water power. WWPC has a property right thereunder by which it is entitled to continue to operate and maintain the Little Falls development without diminution or enlargement of its pre-FWPA status. We have determined that the Secretary of the Interior was not empowered by the Act of March 3, 1905, to authorize the construction of a dam in the Spokane River. We have also determined that WWPC was required by Section 9 of the Rivers and Harbors Appropriation Act of

1899 to obtain the direct consent of Congress for the construction of its dam, and of the Chief of Engineers and the Secretary of War, and that WWPC did not do so. Therefore, WWPC's authority under its 1906 and 1908 permits is incomplete, and, as indicated in Opinion No. 117, at 23, WWPC is required by the first sentence of Section 23(b) either to cease operating its dam, or to obtain a license under the FPA for the continued operation and maintenance of its Little Falls development. Such a license would not require payment of annual charges for the continued use, occupancy and enjoyment of WWPC's permitted lands.

During the hearings and debates on the FWPA, Congress was confronted with the interacting problems of (1) protecting the public against excessive profits by licensees who would utilize the lands and waters of the United States to generate

electric power, and (2) allowing sufficient profits to provide incentives for constructing and financing water power projects. Congress chose to leave the regulation of electric rates to the States and, therefore, approached both problems through the regulation of profits. That regulation was embodied in the "net investment" concept which, in its simplest terms, would assure a return of investment through profits to the extent earned, and through a payment at or after the end of the term of the license to the extent that the investment was not previously recovered through profits. "After long negotiation and many conferences, representatives of the largest operating companies and of the leading investment bankers have agreed that the cost basis as above stated will be satisfactory from an investment standpoint, that money for development can be secured, if such basis

is expressed in definite language in the bill." O.C. Merrill's Memorandum to the Secretary, 42 FPC, at 345.

The hearings and debates on the FWPA took place during the period of World War I and the post-war inflation, which was thought to be a cyclical and temporary matter, to be followed by depression. In such an atmosphere, those who wanted to protect utility investments from being eroded by deflation became proponents of a cost-based "net investment" takeover and relicensing price, and opponents of a value-based "fair value" takeover and relicensing price. *See* 42 FPC, at 334.[30]

Section 3(13) of the FPA thus defines "net investment" in terms of "actual legitimate original cost." And Sections 14(a) and 15(a), respectively, assure the recovery of a licensee's investment, not to exceed the fair value of the property taken, either during the term of a

license, or at or after its expiration upon takeover by the United States or transfer to a different licensee.

As more fully discussed in Opinion No. 36-A (*Escondido Mutual Water Company, et al.*, Project No. 176), issued November 26, 1979 [9 FERC ¶ 61,241], the takeover or relicensing price is computed as follows:

$$\text{transfer price on takeover or relicensing} = \frac{\text{net investment (viz., actual - earnings in excess of a fair return on such investment}}{}$$

In the case of a hydro-electric development that does not recover any of its cost from excess earnings, the transfer price will be the original cost (limited by the fair value). But in the case of a development that recovers all of its cost from excess earnings, the transfer price will be zero. In other words, a licensee is assured of a "fair return" on its "net investment," and is also assured of recovering its "net

investment" either from earnings in excess of that return during the term of its license, or from a transfer payment made at or after the expiration of its license. *See* 40 FPC, at 941.

Such "actual legitimate original cost" "net investment" is applicable to all licenses with the exception of one class. The proviso to Section 23(a) states that when the holder or possessor of a pre-FWPA permit, right-of-way or authority, elects to exchange the permit, right-of-way or authority for a license for a constructed project, the "fair value" of the project as of the date of the license shall be the "net investment." Licenses issued pursuant to the authority of Section 23(a) are thus called "fair value" licenses.[31]

As discussed in Opinion No. 117, at 4, Section 23(a) of the FPA provides an option for those who, on June 10, 1920,

had authority to occupy government lands and navigable waters. They can continue to occupy those lands and waters under their existing authority, in which case they will be entitled to "just compensation" in the constitutional sense if their occupancy rights are taken through the power of eminent domain. Or they can exchange their authority for a license under the FPA, in which case their occupancy rights can be transferred at or after the expiration of the license for a payment of "fair value" "net investment".

While we equate "fair value" in the sense of the proviso to Section 23(a), to "just compensation" in the constitutional sense, for present purposes, "fair value" "net investment" inherently provides a smaller payment than "just compensation."[32] That is because "fair value" is determined at the beginning of a license, and is subject to a deduction of

"earnings in excess of a fair return on such investment," whereas "just compensation" is determined at the time of a taking, and is not subject to such a deduction. In other words, a pre-FWPA permittee electing to continue to occupy lands and waters under existing authority, will receive the value of its property taken under the power of eminent domain, and will keep all prior earnings on that property. But a pre-FWPA permittee electing to exchange its authority for a license, will receive the value of its property transferred on takeover or relicensing, less the earnings in excess of a fair return on that property during the term of the license, and will keep the prior earnings constituting the fair return during the term of the license, and all earnings on that property prior to the license.

Furthermore, Congress provided a scheme by which those who sought licenses for developments to be constructed, whether voluntarily or by coercion of Section 9 of the Rivers and Harbors Appropriation Act of 1899 or Section 23(b) of the FPA, were subjected to a cost-based "net investment." And those who were coerced to seek licenses for *existing developments without pre-FWPA authority* were subject to the same cost-based "net investment." Only those who have a choice of continuing to utilize authority that existed before the FWPA, or exchanging it for authority under the FPA, are subjected to a value-based "net investment." That choice does not exist when there is pre-FWPA authority to occupy lands but not water and, therefore, those who are coerced by Section 23(b) to seek licenses for existing developments with pre-FWPA authority to occupy lands but not waters,

are subjected to cost-based "net investment."

In *Niagara Falls Power Co. v. Federal Power Commission*, 137 F.2d 787 (2nd Cir. 1943), Judge Learned Hand addressed a possible reason why Congress provided "fair value" "net investment," instead of "actual legitimate original cost" "net investment," for such voluntary exchanges, at 791:

> . . . Although Congress of course meant to exclude certain existing "projects" from the new system, in general its purpose was to set up a system of comprehensive regulation of water power. We must assume that it may have felt its hands tied to some extent; the Supreme Court both before and since 1920, has held indefeasible a grant, once made and acted upon. *United States v. Central Pac. R. Co.*, 118 U.S. 235, 238, 6 S.Ct. 1038, 30 L.Ed. 173; *United States v. Northern Pac. R. Co.*, 256 U.S. 51, 63, 64, 41 S.Ct. 439, 65 L.Ed. 825. There are said to have been many valid licenses outstanding in 1920, issued by federal authorities

> which it was at least doubtful whether Congress could "affect" at all; § 23(a) excluded these and they adequately account for its enactment.[33]

Having found no indication that Congress considered the problem involved herein of pre-FWPA authority to occupy lands but not waters, we are persuaded by the legislative history of the first paragraph of Section 23 of the FWPA, which is now Section 23(a) of the FPA, as to following: All the way through Congress, until the very end, the first paragraph of Section 23 said that existing authority would not be *revoked* by the new law, but could be exchanged for authority under the new law. And nothing more. The adoption of Pinchot's suggested "verbal change," as it was later called, from "revoked" to "affected," indicated that Congress intended to neither enlarge nor diminish existing authority, and that the forepart of the first paragraph of Section 23 still

meant that existing authority would be *preserved* unless voluntarily exchanged for authority under the new law. Section 29, repealing inconsistent statutes, would not apply to existing authority under those statutes.

But the adoption of Pinchot's suggested proviso, pertaining to future transfer prices when existing authority would be exchanged for authority under the new law, indicates that the forepart of the paragraph, saying that existing authority would not be revoked or affected, was speaking of the existing authority for operating and maintaining hydro-electric developments, and was not addressing future transfer prices. *Congress used the proviso to address future transfer prices*, fixing "fair value" "net investment" as the transfer price in cases of *voluntary* exchange, and remaining silent as to the transfer price

in cases of continued utilization of existing authority. It was not necessary to address the transfer price as to the latter class of cases since they would be covered by the "just compensation" clause of the Constitution.[34]

We have therefore concluded, as indicated, that we read the word "affected" too broadly and, therefore, that Opinion No. 117 is wrong insofar as it indicates, at 26 and 27, that Section 23(a) protects WWPC's constitutional right to "just compensation" for its permitted property interest in the 108 acres if the Little Falls development is in the future taken over by the United States or transferred to another in a relicensing. WWPC will be compensated, if at all, on the basis of its "actual legitimate original cost" "net investment," plus any severance damages.

While WWPC's 1906 and 1908 permits authorize the utilization of 10,000 cfs of the flow of the Spokane River for the development of water power, it appears upon reconsideration that WWPC may not be entitled to *any* compensation for that authorization if it is taken over by the United States or transferred to another in a relicensing. In addition to our conclusion that Section 23(a) does not address future transfer prices, other than as expressly set forth in the proviso, WWPC's authorization to so utilize the waters would not be within the scope of Section 23(a) to the extent that it is derived from the State of Washington[35] and may not be a property right in the constitutional sense to the extent that it is derived from the Secretary of the Interior.[36]

The Supreme Court held, in this connection, in *United States v. Chandler-*

Dunbar Water Power Company, 229 U.S. 53 (1913), that a private right to utilize waters of a navigable waterway for the development of water power is subordinate to the public right to utilize the waters for navigation and, therefore, the owner of the water power right does not lose a property right in the constitutional sense, and is not entitled to compensation, when the use of the waters is taken for the dominant public right of navigation.

In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), the Supreme Court appears to have enlarged its Chandler-Dunbar holding, and to have held that an identical private right to utilize waters of a navigable waterway *for the development of water power*, is subordinate to all public rights to utilize the waters that are within the commerce power of Congress, including the

public right to utilize the waters for the development of water power. Therefore, the owner of the private power right would not lose a property right in the constitutional sense, and would not be entitled to compensation, when the use of the waters is taken for the dominant public power right. The Supreme Court said, in this connection, 311 U.S., at 424 (emphasis added),

> The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits *without compensation* is entirely within the Government's discretion."
>
> ["] *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 66, 69, 76; cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330.]

The Supreme Court also said, 311 U.S., at 426, that the authority of Congress "is as broad as the needs of commerce," and that the utilization of navigable waters for water power is as much a commercial use of the waters as their utilization for navigation. And the Supreme Court concluded, at 427 (emphasis added; citations omitted),

> It has been shown, note 77, *supra*, that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; *nothing for the water power.*

We have therefore reached no conclusion as to whether any values are allowable for water rights under Section 14(a) of the FPA in the light of the foregoing Supreme Court decisions. That issue should be addressed in a proceeding

in which there are parties who will be affected by the decision.

Scope of the License Amendment

Having determined that WWPC is required by Section 23(b) of the FPA to amend its license for Project No. 2545 to include the continued operation and maintenance of the works of the Little Falls development, we turn to the question of whether WWPC has an option under Section 23(a) to continue to operate and maintain those works under and to the extent of the authority of its 1906 and 1908 permits, or to exchange that authority for new authority under the FPA. As discussed *supra*, at 35-36, Congress used the proviso of the first paragraph of Section 23 of the FWPA, which is now Section 23(a) of the FPA, to fix transfer prices in cases of *voluntary* applications for licenses authorized in the forepart of that section. Accordingly, we are

persuaded by the legislative history that when government lands *and* navigable waters are occupied for the development of water power, the option to continue to utilize existing authority, or to exchange it for new authority under the FPA, applies only to those situations in which valid authority to occupy government lands *and* navigable waters co-existed on June 10, 1920. And we have concluded, consistent with *The Montana Power Company*, *supra*, that since WWPC does not have pre-FWPA authority to occupy navigable waters, it does not have an option to utilize or exchange the authority under its 1906 and 1908 permits, contrary to Opinion No. 117, at 25. Accordingly, the last six paragraphs of that Opinion are hereby superseded (except that notes 36 and 37 are retained).

All or part of the 108 acres and WWPC's fee simple lands, the use and

occupancy of which are necessary or appropriate in the maintenance and operation of the Little Falls development, should be included within the project boundary to the extent required by the Commission's Regulations under the FPA. Similarly, the right to utilize 10,000 cfs of the flow of the Spokane River which is necessary or appropriate in the operation of the development, should be included within the license. The 108 acres, or the part thereof within the project boundary, and the 10,000 cfs, will thus become part of the "project adopted . . . such as in the judgment of the Commission will be best adapted to a comprehensive plan for . . . beneficial public uses," within the purview of Section 10(a) of the FPA. And the Commission's authority over the permitted lands, waters and physical structures, will be as full and complete as though no permits exist.

Section 10(e) of the FPA requires the Commission to fix annual charges for the purpose of (1) reimbursing the United States for the costs of administering Part I of the FPA and (2) recompensing the United States "for the use, occupancy, and enjoyment of its lands or other property." The payment of annual charges for administering Part I of the FPA is a burden of the license that is properly payable by WWPC as part of the price for the privilege of operating and maintaining the Little Falls dam in the Spokane River. But, as discussed in Opinion No. 117, at 11-15, we perceive WWPC's interest in the 108 acres as a right, to use, occupy and enjoy those lands for the development of water power, indefinitely, as long as the lands are so used. While the United States has a reserved interest in those lands, it does not have a present and ongoing right of occupancy.[37] As a result, the permitted

lands are not "its lands," meaning lands of the United States, for the purpose of recompensing the United States pursuant to Section 10(e) for their present and ongoing use, occupancy and enjoyment. And, as a further result, there will be no annual charges for WWPC's use, occupancy and enjoyment of the permitted lands brought under license.

Opinion No. 117 indicates, at 12, that the issue of the validity of the grants under the Act of March 3, 1905, was not reached because the 108 acres are "reservations" within the purview of Section 3(2) of the FPA whether or not the grants were void. And the Opinion reflects that notion at 26, n. 35, which states that the Spokane Indian Tribe would be entitled to annual charges if the grants are challenged successfully in litigation initiated for that purpose. On further consideration, however, the findings in

Opinion No. 117 and herein to the effect that WWPC has valid permits that were granted by the Secretary of the Interior on November 3, 1906, and August 29, 1908, could be construed by a court as being decisive of the validity of the grants because WWPC's interests in the 108 acres are derived through the permits. In other words, the permits authorized the purchase of the property interests that are the grants, and, therefore, all issues pertaining to the validity of the grants are arguably subsumed within the issues pertaining to the validity of the permits. Since the Spokane Indian Tribe is a party to this proceeding, it may be bound by the findings that WWPC has valid permits and may be unable to pursue separate litigation to challenge the grants.[38]

Although Wilson appropriated the flow of the Spokane River only for the purpose of developing water power, he sought the

right to erect and maintain the project works "for the development of power [,] for the diversion of water for irrigation and other beneficial use of said water." WWPC, on the other hand, appropriated the flow for the purposes of irrigation and developing water power, and sought the right to use the water and acquire the land "for the development of power and for the beneficial use of the water," closely tracking the statutory language. The Secretary of the Interior endorsed his approval in both cases, and therefore, we conclude that WWPC's 1906 and 1908 permits cover all beneficial public uses of the water, as does Section 10(a) of the FPA. As a result, there will be no conflicts between the terms of the permits and the requirements of the FPA if at some future time it is determined that some or all of the water should be used for beneficial

public purposes other than the development of hydro-electric power.

In summary, the Little Falls development will be fully subject to the provisions of Part I of the FPA, except with respect to the payment of annual charges for the use, occupancy and enjoyment of the 108 acres, or the part thereof within the project boundary.

Deferral of Filing Obligation and Denial of Oral Argument

Many of the permits and rights-of-way for the development of water power that were granted before June 10, 1920, were either revocable at will, or were granted for periods of 50 years or less, and many have been revoked or have expired. However, 99-year permits were granted and have not yet expired, and some permits of indefinite duration were also granted.

The Act of March 3, 1905, was special legislation pertaining to an Indian

reservation on a segment of one river and, to our knowledge, only two power sites were permitted under that Act. The Little Falls site is the subject of this proceeding, and a downstream site was condemned after the *Big Bend* decision and became part of the Grand Coulee development.

In Opinion No. 117 and this Opinion No. 117-A on rehearing, we have determined that WWPC has two valid permits that were granted under the Act of March 3, 1905. We have also interpreted the terms of those permits to determine whether a license under the FPA is required. And we have determined that the permits are ones of indefinite duration, and that such a license is required.

Insofar as this proceeding involves permits of indefinite duration for partial authority for the occupation of lands and waters for the development of water power,

we regard as unique the ongoing interaction of the authority under the permits, and the requirements of, and the authority under, the Federal Power Act. Accordingly, we will in our discretion modify Ordering Paragraph (B) of Opinion No. 117 to begin, "Within 90 days of the date on which this Opinion and order becomes final and nonappealable . . . " WWPC's obligation thereunder to file an application to amend its license for Project No. 2545 will thereby be deferred until after the completion of judicial review, and its motion for a stay will thereby be mooted. The other changes to Ordering Paragraph (B) are technical ones for conformity to this Opinion No. 117-A.

Furthermore, we will in our discretion also deny WWPC's motion for oral argument.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed May 8, 1981, by The Washington Water Power Company, present no facts or legal principles which would warrant any change in or modification of Opinion No. 117 and order issued April 8, 1981, except as that Opinion and order is modified and clarified herein.

The Commission further finds in lieu of the fifth additional finding and conclusion of the presiding judge, as previously modified by the Commission:

The Washington Water Power Company operates and maintains the Little Falls Dam in and across the Spokane River, a navigable water of the United States within the State of Washington, together with conduits, a power house, and other works of the Little Falls project incidental to the development of electric power across, along or in the Spokane

River, partly under and in accordance with the terms of two permits granted prior to June 10, 1920, and partly without having a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Federal Power Act, in violation of Section 23(b) of the Federal Power Act.

The Commission orders:

(A) The application for rehearing of Opinion No. 117 filed by The Washington Water Power Company on May 8, 1981, is denied.

(B) Ordering Paragraph (B) of Opinion No. 117 is hereby modified to read as follows:

> (B) Within 90 days of the date on which this Opinion and order becomes final and nonappealable, The Washington Water Power Company shall file an application pursuant to the Federal Power Act and the Commission's Rules and Regulations thereunder to amend

its license for Project No. 2545 to include as part of the project the Little Falls development. The license amendment will not provide for annual charges for the use, occupancy and enjoyment of the interests in the lands brought under license that were purchased under and pursuant to the permits granted by the Secretary of the Interior on November 3, 1906, and August 29, 1908.

(C) The motion for oral argument filed by The Washington Water Power Company on May 8, 1981, is denied.

Chairman Butler *dissented* with a separate statement attached.

-Footnotes-

[1] The substance of Section 1.31(c) is now contained in Rule 711(d) of the Commission's Rules of Practice and Procedure.

[2] The Grand Coulee development was authorized by Section 2 of the Act of August 30, 1935, 49 Stat. 1028, at 1039-40, for the purpose, among others, of "improving navigation."

In this connection, we take official notice of the United States Geological Survey's 1973 Little Falls

Quadrangle, Washington, 7.5 minute series topographic map, which labels the river below the dam as the Spokane River *and* Franklin D. Roosevelt Lake, and shows the Coulee Dam National Recreation Area as embracing land on both sides of the river to the Little Falls dam, including the area surrounding the Little Falls powerhouse. The Grand Coulee development was authorized by Section 2 of the Act of August 30, 1935, 49 Stat. 1028, at 1039-40, for the purpose, among others, of "improving navigation."

[3] The water stored in Long Lake is subject to multiple beneficial public uses under WWPC's license for Project No. 2545. Since the Little Falls dam is operated in hydraulic coordination with the Long Lake dam less than five miles upstream, and since there is no storage and only pondage at Little Falls, the Little Falls dam must, as a practicable matter, also be operated for multiple beneficial public uses, rather than the single use of generating electric power.

[4] In *Federal Power Commission v. Union Electric Co.*, 381 U.S 90 (1965), the Supreme Court held that "Congress has required a license for a water power project utilizing the [nonnavigable] headwaters of a navigable river to generate energy for an interstate power system." But in *Farmington River Power Co. v. Federal Power Commission*, 455 F.2d 86 (1972), the Second Circuit held that a license is not required for a dam constructed prior to 1935 across a nonnavigable stream.

Since the term "project" is defined in Section 3(11) of the FPA to mean a "complete unit of improvement or development, consisting of . . . all dams and appurtenant works and structures . . . which are a part of said unit," projects sometimes consist of more than one development. As

licensed in 1972 (48 FPC 339), Project No. 2545 consisted of WWPC's Upper Falls, Monroe Street, Nine Mile and Long Lake developments, which were found (48 FPC, at 348) to be subject to the Commission's licensing jurisdiction as affecting "the interests of interstate commerce." The navigability of the Spokane River didn't matter because, even if the river was nonnavigable, it is a headwater of the navigable Columbia River (*Union Electric*), and the developments that were licensed included significant improvements after 1935 (*Farmington*).

As appears from the record of this proceeding, the works of the Post Falls development, which were included in the license later, and those of the Upper Falls development, occupy a part of the Spokane River that was and is navigable in fact because it was used as a highway for sawlog commerce. Thus, various works of Project No. 2545 are required to be licensed, and are licensed, for different reasons.

Since the Commission licenses the construction, operation and maintenance of "project works," which are defined in Section 3(12) of the FPA as "the physical structures of a project," rather than "projects" as such, the Commission ordinarily licenses all of the works of a "project" (whether or not it consists of more than one development) if any of the works of the "project" are required to be licensed. All works under common ownership ordinarily are covered by the same license, whereas works under co-ownership or different ownership are covered by a joint or separate license that is coordinated in its terms--to the end that all of the works of a "project" are covered by a license.

The hydraulic coordination of developments is a strong if not irrefutable indication that two or more developments should be treated as parts of the same complete unit of improvement, *i.e.*, as a single "project," because the implication is that the combined operation produces a greater economic value than if the developments were operated separately. Therefore, when a development, such as Little Falls, is operated in hydraulic coordination with another development that is required to be licensed, the Commission ordinarily requires the works of the coordinated development to be licensed as part of the same "project," even though there may not be an independent requirement for licensing the works of the coordinated development (such as navigability at the site of the coordinated development, or the construction of works of a coordinated development on a nonnavigable stream after 1935).

Accordingly, WWPC's concession that the Little Falls development is operated in hydraulic coordination with the other developments of Project No. 2545 is a strong if not irrefutable admission that it must have a permit or license to operate and maintain the works of the Little Falls development without regard to whether the Spokane River was or is navigable at that site.

[5] The courts have recognized the flotation of sawlogs as being important in determining the navigability of waterways for purposes of the FPA. *See*, for example, *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785 (9th Cir. 1981) (shingle bolts); The *Connecticut Light and Power Co. v. Federal Power Commission*, 557 F.2d 349 (2nd Cir. 1977); *State of Wisconsin v. Federal Power Commission*, 214 F.2d 334 (7th

Cir. 1954); and *Wisconsin Public Service Commission v. Federal Power Commission*, 147 F.2d 743 (7th Cir. 1945).

[6] 1981 Guinness Book of World Records, at 269.

[7] The spillway of the Grand Coulee dam is at an elevation of 1,289 feet m.s.l. according to the Little Falls Quadrangle map, and the tail water of the Little Falls development is at 1,286 feet m.s.l. according to Exhibit No. 105. Of the 60 end-of-month surface elevations of Franklin D. Roosevelt Lake shown in Exhibit No. 137, one-half are below the 1,286-foot level, generally in the Spring months when the lake is presumably evacuated for flood control purposes.

[8] *See United States v. Big Ben Transit Company*, 42 F. Supp. 459 (E.D. Wash. 1941), at 470.

[9] We take official notice of the 1983 Annual Report of the Chief of Engineers, United States Army, to the Secretary of War, Part I, at 446, and Part IV, at 3458-3461. The preliminary examination was authorized by the Act of July 13, 1892 (27 Stat. 88), under which it was to be determined (1) whether the river was "worthy of improvement by the General Government... including the present and prospective demands of commerce" and, if so, (2) the cost of a survey "with the view of submitting plan and estimate for its improvement." Captain Symons reported that in his opinion the river was worthy of such improvement "to the extent of providing an all-the-year navigation for boats drawing 3 feet of water, provided a careful survey shows the practicability of making the improvement at a moderate cost and without seriously interfering with vested interests." Captain Symons' superior supported him, but the Chief of Engineers reported to the Secretary of War that in the judgment of his office the

river was not worthy of improvement by the General Government.

The Chief of Engineers did not explain why he thought the river was not worthy of improvement. Captain Symons' physical description indicates that steamers on Coeur d'Alene Lake could reach Post Falls throughout the year if a three-foot channel was provided, either by clearance and dredging, or by raising the dam at Post Falls. He expressed apprehension, however, that a channel through the bar at the source of the river might be detrimental to the utilization of Coeur d'Alene Lake as a storage reservoir and, consequently, reduce the flow available for the vested water power and manufacturing interests at Post Falls and Spokane. And he indicated that he understood that the power interests at Post Falls, rather than the General Government, would finance a raising of the dam, which appeared from an accompanying letter to be the preferable course.

Captain Symons examined the river in the latter part of July 1892 and reported on September 7th that there was, "at present, no navigation on this portion of the river on account of the shallowness of the water at the low stages of the lake and river." An accompanying letter on behalf of the mayor of Post Falls dated July 26, 1892, called the bars "riffles" and said (emphasis added),

> As it is now, during the months of July, August, and September, the period of low water, navigation is *practically* suspended, there being only 20 to 24 inches of water on the riffles, and the obstacles in form to make steamboating *difficult*. As the summer is the vital time, navigation here has therefore received no systematic encouragement.

The words "practically" and "difficult" (rather than "impossible") suggest that there was some steamboating to Post Falls in periods of low water, if not also in periods of higher water. Certainly, if the river was marginal for steamboats, it was susceptible of being used for commerce by lesser craft.

[10] Opinion No. 117, at 19, n. 26.

[11] Limitations of Federal Control of Water Powers, An Argument before The National Waterways Commission, by Hon. Rome G. Brown, published in 1912 as Senate Document No. 721, 62nd Congress, 2nd Session, at 39.

See, *also*, 27 Op. Atty. Gen. 120 (1908), to the effect that the consent of Congress was needed for the construction of a bridge over a non-navigable portion of a navigable river. Furthermore, in the Application for Rehearing, at 9, WWPC challenges navigability only downstream from Spokane, conceding by implication navigability upstream in Washington and Idaho.

In *Cummings v. Chicago*, 188 U.S. 410 (1903), the Supreme Court said, at 431, that the effect of the Rivers and Harbors Appropriation Act of 1899, reasonably interpreted,

> is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under

existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies. In other words, when the navigable portions of a waterway were wholly within a single State, the Secretary of War consented on behalf of Congress pursuant to the Secretary's delegated authority, as does the Commission today within its sphere of authority under the FPA.

[12] We take official notice, in this connection, of the 1905 Annual Report of the Chief of Engineers, United States Army, at 726.

[13] Additionally, the 1881 and 1892 Symons excursions establish that the river was navigable in the sense of *The Daniel Ball* at both its mouth in Washington and its source in Idaho. Statements to the contrary should be read in the context of navigability for the present movement of troops, equipment and supplies along the middle reach of the river.

Considering that Captain Symons' report shows that the river was clearly capable in its natural condition of floating sawlogs almost 9 miles from Coeur d'Alene Lake to Post Falls, Idaho; that Post Falls is less than 6 miles from the Idaho-Washington boundary; and that the configuration of the river at Post Falls did not preclude its use for floating sawlogs another 22 miles to Spokane, Washington, WWPC was required by Section 9 of the 1899 statute, or at least by the proviso of Section 9, to submit its plans for the Little Falls dam to the Chief of Engineers and the Secretary of War because the river was being used for commerce in its ordinary condition in at least one State. And if WWPC had done so, presumably it would have obtained the consent of

Congress, either directly by legislation, or through the Secretary of War as discussed in *Cummings v. Chicago*, *supra*, at n. 11.

[14] Senate Report No. 4378, 58th Congress, 3rd Session.

[15] As used in that statute, the word would apply to structures as small as minor barriers controlling the flow of irrigation ditches.

[16] The Act of March 3, 1905, in common with other statutes enacted prior to June 10, 1920, empowered a unit of government to authorize the occupation of lands and the utilization of waters over which Congress had jurisdiction under one or more of its delegated powers. Similarly, the FPA empowers the Commission to authorize the occupation of some of those lands and waters for the development of water power. But unlike some of those pre-FWPA statutes, the FPA expressly empowers the Commission to authorize certain activities (construction, operation and maintenance) of "project works," which are the physical structures of a project, and prohibits the same activities with respect to such "works" without having a pre-FWPA permit or a license. Nonetheless, we are persuaded that WWPC's 1906 and 1908 permits (*see* WWPC's PERMITS, *infra*) include *implied* authorization to operate and maintain all of the physical structures of its Little Falls development that occupy the permitted lands, to the extent they do not also occupy the permitted waters. We are so persuaded because express authorization to occupy lands and utilize waters *for* specified purposes, as in Section 2 of the Act of March 3, 1905, would appear to include implied authorization to engage in the activities that are necessary to carry on those purposes. But the Act of March 3, 1905, was an exercise of the

authority of Congress over government lands (and waters incident to those lands), and did not supersede the 1899 statute, which was an exercise of the authority of Congress over commerce, and prohibited unauthorized structures in navigable waters.

[17] Consistent with the premise that the Secretary of the Interior was empowered by the Act of March 3, 1905, to authorize the construction of dams in the river, the court did not address and, therefore, presumably did not consider the prohibitions of Section 9 of the Rivers and Harbors Appropriation Act of 1899 and the first sentence of Section 23(b) of the FPA.

In this proceeding, David Wilson and WWPC both sought authority for a dam across the Spokane River, and Interior may have thought that it was empowered to grant such authority. Our point is that the Secretary of the Interior was not empowered to grant such authority, and that the intent of Congress as shown by the legislative history must control over any interpretation to the contrary.

[18] As discussed, *infra*, the Department of the Interior treated the Act of March 3, 1905, as a right-of-way statute similar to the one from which it was derived. Pre-FWPA permits and rights-of-way are treated the same under Section 23(a) of the FPA.

[19] While rehearing of WWPC's Error No. 7 is thus granted, it does not change the result and, therefore, this Opinion No. 117-A on rehearing is entitled a denial of rehearing.

[20] While the concept of a transfer application produces a rationale that is consistent with Section 3 of the Act of March 3, 1905, that was not the only possible alternative. The Secretary of the Interior could have decided that Wilson had not applied in good faith, as discussed by the judge, or that Wilson ceased to hold the permitted lands for the permitted purposes when he agreed to the transfer to WWPC. In either such case, and again, in fairness to WWPC, he should have suggested the filing of an amendment to WWPC's application to cover and pay for the 100 acres that would no longer have been considered as being permitted to Wilson.

[21] Affirmed sub nom. *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785 (9th Cir. 1981).

[22] The new first sentence was added at the beginning of the former second paragraph of Section 23, and did not replace anything.

[23] WWPC also relies on the similar explanation in House Report No. 1318, 74th Congress, 1st Session, at 25.

[24] The comparable sentences in House Report No. 1318, 74th Congress, 1st Session, said (emphasis added),

> . . . The second paragraph of section 23, here lettered subsection (b), is also amended by expressly making unlawful the *construction* of any dam, water conduit, reservoir, or power house in any of the navigable waters of the United States, or upon any of the public lands or reservations of the United States,

except pursuant to a permit granted prior to June 10, 1920, or a license granted pursuant to the act.

This provision is in substance the *present result under* the River and Harbor Act of 1899 and the Water Power Act.

In other words, the 1899 statute prohibited the construction of dams and other obstructions in navigable waterways without the consent of Congress. Congress in 1920 delegated to the Commission the authority to consent to the construction in navigable waterways of dams and other obstructions for the development of power. And Congress said in the House and Senate reports in 1935 that it wasn't changing anything--that it was adding the first sentence of Section 23(b) to express in the FPA the combined result under the 1899 and 1920 statutes.

[25] *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925), at 429.

[26] See House Report No. 910, 66th Congress, 2d Session, dated April 30, 1920, designated as the Conference Report.

[27] The Commission is expressly required by the first sentence of Section 23(b) to look to and interpret the terms of pre-FWPA permits.

[28] The Act of March 3, 1905, was derived from the Act of February 15, 1901, and was also a "public-land, right-of-way" statute. It authorized the occupancy of reservation lands and the utilization of the waters on those lands, but not the occupancy of those waters over those lands. And it did not repeal the 1899 statute expressly or by implication.

[29] The Court of Appeals said, at 496,

> Land permit statutes enacted subsequent to 1899, under which petitioner now asserts authority for Holter, merely supplemented the 1899 Act and did not remove the separate license requirement contained therein. Thus, a general grant of authority to the Secretary of the Interior to build reservoirs in aid of reclamation did not carry with it consent to obstruct navigable waters. Additional authorization therefor from the Secretary of War was held to be necessary", citing *United States v. Arizona*, 295 U.S. 174, 191, 55 S.Ct. 666, 79 L.Ed. 1371 (1935).

[30] The deflation came as expected, in the early 1920's, and was followed by a period of inflation in the middle to late 1920's. Then came the depression of the 1930's, and near continuous inflation to the current time. In the light of the experience of the past 62 years, those who favored a cost-based transfer price, today, undoubtedly would favor a value-based price.

[31] In the wake of inflation, such a value-based "net investment" will be a higher figure than cost-based "net investment." But that was not so at the time of the debates on the FWPA, when deflation was expected. As discussed, *infra*, value-based "net investment" was simply a method o f fixing a "net investment" figure for existing projects for which cost records were not maintained prior to the FWPA.

[32] In the wake of inflation, "just compensation" at the time of taking will provide a higher figure than "fair value" at the beginning of a license, because of the time lag. The

discussion that follows assumes that "fair value" does not change during the term of a license.

[33] The proviso to Section 23(a) was suggested by Pinchot to Senator Jones to provide a method for determining "net investment" when pre-FWPA permits are surrendered for licenses. It was thus added by the Committee on Commerce and modified by the Committee of Conference. As explained in the Conference Report, *supra*, at 13, "This amendment provides for the determination of the valuation of projects already constructed when application is made for a license to come under the provisions of the act."

[34] Even if the part of Section 23(a) that says that Part I of the FPA shall not be construed as affecting pre-FWPA permits and authority, is construed as addressing transfer prices (contrary to our conclusion), Opinion No. 117 and this Opinion No. 117-A on rehearing requiring licensing do not affect those permits or that authority. WWPC had incomplete authority before June 10, 1920, because it was prohibited by Section 9 of the Rivers and Harbors Appropriation Act of 1899 from constructing a dam at Little Falls, and its 1906 and 1908 permits did not confer authority to maintain that dam; and, as a result, WWPC has incomplete authority today. WWPC has always operated the Little Falls development illegally, and the transfer price of its partial authority should reflect that fact under any scheme of compensation.

[35] *Bellows Falls Hydro-electric Corporation*, 2 FPC 380 (1941).

[36] On the other hand, Section 14(a) of the FPA provides that in administering the "net investment" concept detailed

therein, "the values allowed for water rights . . . [shall not] be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee . . ."

[37] If the Commission were to grant WWPC the present and ongoing right of occupancy under the FPA, requiring the payment of annual charges for that occupancy, such action could be construed as a taking of WWPC's property interest in the permitted lands without payment of just compensation.

[38] Without deciding whether the Spokane Indian Tribe is sufficiently "aggrieved" by this clarification of Opinion No. 117 to be entitled to apply for rehearing of this Opinion No. 117-A pursuant to Section 313(a) of the FPA, we will entertain an application for reconsideration of Opinion No. 117 if it is timely under Section 313(a) for rehearing of this Opinion No. 117-A, since the Tribe may have been misled by Opinion No. 117.

* * *

Butler, Chairman, dissenting:

The majority Opinion goes to extraordinary lengths to extend the Commission's jurisdiction over Little Falls Dam. This conclusion is nowhere better demonstrated than where the Opinion specifically takes official notice of an 1893 Report of the Chief of Engineers, U.S. Army. See majority Opinion, mimeo at

11-12, n.9. In doing so the Opinion has exceeded the proper limits of official notice.

Official notice is the administrative counterpart of judicial notice. The rationale for allowing a court or administrative tribunal the device offered by such notice is that it serves no purpose to require proof of obvious and notorious facts. *Judicial notice* is limited in scope. It extends only to facts within the knowledge of most men and facts which are capable of immediate and accurate demonstration by resort to easily accessible source of indisputable accuracy. "Hence judicial notice extends only to facts commonly known or which anyone may establish accurately by resort to a calendar, almanac, or the like." B. Schwartz, *Administrative Law* (1976) at 364-65. In contrast, *official notice* is broader in scope than judicial notice.

Under official notice, an agency may be permitted to notice facts which are only obvious and notorious to an *expert* in a given field. This approach allows an agency to also notice facts contained in reports, and records in its files. In *Wisconsin v. F.P.C.*, 201 F.2d 181 (D.C. Cir. 1952), the D.C. Circuit allowed official notice of reports filed with the FERC but did so apparently because they were filed by the regulated entity involved in the proceeding. *In re Hugoton-Anadarko Area Rate Case*, 466 F.2d 974 (9th Cir. 1972), the Ninth Circuit allowed the Commission to take official notice of an AGA report, but did so in that proceeding apparently because all parties had an opportunity to object to the report.

The information contained in the 90-year old report contains information which is not obvious and notorious to the

average man or to an expert in the given field. As juxtaposed with the *Wisconsin and Hugoton* decisions, the report is neither a document filed by a regulated entity involved in this or any other proceeding, nor did the parties to this proceeding have an opportunity to object to the report. Consequently, it should not be officially noticed and it should not be relied on by the Commission in this proceeding.

The Commission also appears to place substantial--and I believe undue--reliance on an 1892 report authorized by a Captain of the U.S. Army Corps of Engineers. Mimeo at 11-12 (Exhibit 159). Exhibit 159 is not information required by the Commission to be filed nor is it a report regularly kept on file and normally relied on by the Commission in the normal course of business. While the introduction into evidence of Exhibit 159 was not

objected to, it should be noted that it was introduced as the last of 159 exhibits introduced *en mass* and it was never referred to before the ALJ by either party again. It should be noted, however, that it was introduced into the record by The Washington Water Power Company to show that the river, at the time of the report, was not considered navigable, contrary to the proposition for which the majority cites it. Significantly, the affidavit attached to Exhibit 159 notes that, according to the Corps of Engineers in June 1978, the Spokane River was considered to be non-navigable prior to 1942. It is only through an overly selective reading of Exhibit 159 that the majority is able to glean support for its finding of jurisdiction.

Finally, if the instant project was constructed pursuant to a permit or existing right-of-way granted prior to

June 10, 1920, Section 23 of the Federal Power Act precludes the Commission from requiring Washington Water Power Company to apply for a license. In addressing this issue, the majority places undue emphasis on the legislative history of Section 2 of the Act of 1905, 33 Stat. 1006. See Opinion No. 117-A, mimeo at 16-17. Section 2 of the 1905 Act appears to empower the Secretary of the Interior to grant lands for the erection of suitable dams for the development of power. Section 2 specifically states that the Secretary is authorized to grant land ". . . as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical, or power plants, dams, wing walls, flumes, or other needful structures required for the development of power or for beneficial use of said water. . . ." The full text of § 2 is appended hereto. Given the plain meaning of the

words used, it is unnecessary to review the legislative history. See C.D. Sands, *2A Statutes and Statutory Construction* § 46.01 (4th ed. 1973). The majority fails to show why the plain meaning of § 2 is either patently or latently ambiguous, or why it must mean something other than what it clearly provides. Consequently, it is irrelevant that some legislative history appears to conflict with the plain meaning of the Act. Nevertheless, the majority disregards the plain meaning and, relying on a single floor statement by Representative Jones, incorrectly concludes that only Congress, not Interior, was empowered to authorize the construction of the instant project.[39]

Interior's interpretation of the scope of its authority under § 2 of the Act is significant and relevant to the present inquiry because Interior was charged with the administration of the

Act. The official record in this proceeding reveals without contradiction that Interior acted on the belief that it had the authority under § 2 of the Act to authorize the occupation of the waters of the Spokane River for the purpose of constructing a dam. On April 5, 1905, David Wilson, predecessor in interest to Washington Water Power Company (hereinafter "Wilson") petitioned the Secretary of the Interior for

> the right to attach any and all structures mentioned in [the Act of March 3, 1905] to the banks of the [Spokane River], and to permanently use and occupy so much of the said bank, together with necessary adjacent lands, to equip said power.
>
> * * *
>
> [and the] right to *occupy and improve said waters* of said river and the land incident thereto. . . .

Exhibit 5 at 2 (emphasis added); Exhibit 9 at 3. It is not only clear that Wilson was requesting authorization to *occupy* the

Spokane River, but that Interior was aware of and approved his request. On November 7, 1905, the Acting Commissioner of Indian Affairs wrote to the Secretary of the Interior and recommended that Wilson's application "be favorably considered." Exhibit 9 at 8. The November 7 letter expressly referred to Wilson's application to "occupy and improve said waters of said river. . . ." Exhibit 9 at 3. On November 11, 1905, the First Assistant Secretary of the Department of the Interior responded to the November 7 letter and approved the Acting Commissioner's recommendation. Significantly, the First Secretary's response likewise expressly referred to Wilson's application to occupy and improve the waters of said river. Exhibit 10 at 3. Having received the preliminary approvals, Wilson made his formal filing with the Department of the Interior where he specifically petitioned for the rights to

use the waters of the Spokane River for a dam (Exhibit 11 at 1) and ". . . *the right to erect and maintain any and all suitable dams*. . . ." (Exhibit 11 at 3) (emphasis added). The final approvals by the Department of the Interior thereafter followed. *See* Exhibits 16-17. The approvals in no way indicated that Congressional approval was a necessary step in the process. In fact there was only one express condition for Wilson to meet prior to construction: Wilson could not commence construction until compensation for lands taken and damages done had been determined and paid. Exhibit 17 at 3. Wilson thereafter applied for the inclusion of additional land and water rights, and such rights were subsequently granted to him by Interior. Exhibits 19-24. To disregard the numerous express references in the record concerning Wilson's requests to occupy the Spokane

River to build a dam, and Interior's specific approvals of those requests, would be to disregard Interior's interpretation of its authority under § 2 of the Act. Furthermore, there is judicial precedent supporting this conclusion. As admitted by the majority, dictum in *United States v. Big Bend Transit Co.*, 42 F. Supp. 459 (E.D. Wash. 1942) indicates that Interior had this authority. The majority, however, simply does "not agree" with the *Big Bend* decision. Opinion No. 117-A, mimeo at 18-19.

Given the plain meaning of § 2 of the Act and Interior's interpretation of § 2, and the dictum in *Big Bend, supra*, it is more reasonable than not to conclude that Interior had the authority to authorize Wilson to occupy the Spokane River; it was not necessary for Wilson to obtain supplemental authority from Congress. Therefore, pursuant to Section 23 of the

Federal Power Act, I would not require Washington Water Power Company to apply for a license.

-Footnote-

[1] The majority asserts instead that Interior's authority under § 2 was limited: Interior had the authority to allow the *use* of water for power purposes but did not have the authority to allow the *occupation* of water for power purposes by dam. *See* Opinion No. 117-A, mimeo at 1.

WASHINGTON WATER POWER CO. v. F.E.R.C.

775 F.2d 305 (D.C. Cir. 1985)

WASHINGTON WATER POWER COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

Spokane Tribe of Indians, Intervenor.

No. 83-2051.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 11, 1984.

Decided Oct. 18, 1985.

Petition for Review of an Order of the Federal Energy Regulatory Commission.

Jerry K. Boyd, Spokane, Wash., with whom Peyton G. Bowman, III and Edward M. Leigh, Washington, D.C., were on brief, for petitioner.

Joel M. Cockrell, Atty., F.E.R.C., Washington, D.C., with whom Jerome M. Feit, Sol., and Joshua Z. Rokach, Atty., F.E.R.C., Washington, D.C., were on brief, for respondent.

Robert D. Dellwo, Spokane, Wash., with whom Gary T. Farrell, Spokane, Wash., was on brief, for intervenor Spokane Tribe of Indians.

Before TAMM* and MIKVA, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge MacKINNON.

Dissenting opinion filed by Circuit Judge MIKVA.

MacKINNON, Senior Circuit Judge:

Two orders of the Federal Energy Regulatory Commission ("FERC" or the "Commission") hold that the Washington Water Power Company ("Washington Power" or the "Company") is required by the Federal Power Act, 16 U.S.C. § 791 *et seq.* ("FPA"), to obtain a license for its hydroelectric development which was completed in 1911 on the Spokane River at Little Falls, Washington. Washington Power

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* Judge Tamm had fully concurred in this opinion prior to his death.

claims it constructed, operates, and maintains the dam and associated structures under the authority of a special Act of Congress approved on March 3, 1905 (the "1905 Act"), and that the Little Falls dam therefore falls within the specific exceptions contained in sections 23(a) and 23(b) of the Federal Power Act.

The Commission contends for a different construction of the 1905 Act. It asserts that the 1905 Act did not authorize the construction of a dam, but only granted to the Company certain land and water rights ancillary to the actual construction of a dam and the occupation of the Spokane River. In addition, the Commission contends that in any case the Department of Interior's approvals under the 1905 Act of the application by the predecessor of the Company, and of the application of the Company itself, were

insufficient to grant the Company the right to construct and operate the dam and the accompanying hydroelectric project, since the 1905 Act allegedly did not authorize the granting of the right to build a dam, but only the use of water and land. To occupy the Spokane River, which the Commission now claims was a navigable waterway of the United States, Washington Power allegedly should have secured permission from Congress and complied with the other requirements of sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899. 30 Stat. 1151 (1899) (codified as amended at 33 U.S.C. §§ 401 and 403 (1982)) (hereinafter cited as the Rivers and Harbors Act). The Commission held that having failed to do this, Washington Power did not have a complete "permit or right of way" prior to June 10, 1920 to construct or to operate the dam, and therefore the dam does not fall under

the exceptions set out in sections 23(a) and 23(b) of the Federal Power Act. However, the 1905 Act incorporates by reference the water law of the State of Washington and provides that applicants for rights of way shall acquire water rights "by appropriation under and pursuant to *the laws of the State of Washington*." This vital provision, which is basic to a proper interpretation of the 1905 Act, is totally ignored by the brief of the Commission. The agency gives absolutely no consideration to this important, if not controlling, provision of the Act. This failure is fatal to the Commission's attempted construction of the Act.

We hold that the Spokane River in 1905-10 was not a navigable waterway of the United States and that the Secretary of the Interior was authorized by the 1905 Act, which incorporated Washington water

law by reference, to consent to and grant qualified applicants valid rights of way to construct dams on and to occupy the Spokane River at Little Falls, and to authorize the construction of the Little Falls development. Washington Power's Little Falls development therefore comes within the statutory exceptions set forth in sections 23(a) and 23(b) of the Federal Power Act, and the Company is *not* required, now that the River below Little Falls has become navigable, to obtain a license to continue to operate and maintain the development at Little Falls.

I. BACKGROUND

Around 1905, David Wilson, a private entrepreneur responsible for much of the development of western Washington State, owned land on the south bank of the Spokane River at Little Falls, about 45 miles downstream from Spokane, Washington (J.A. 637-42). Wilson wanted to use the 83

foot drop in the river at that point (J.A. 637) to produce electricity and to do so needed to obtain an interest in the land on the north bank and in the bed and waters of the river itself. However, the north bank of the river and all land up to the high water mark on the south bank was within the Spokane Indian Reservation (the "Reservation"). Wilson could have obtained a permit from the Secretary of the Interior to use a right of way through the Reservation for a dam, etc., under the Act of February 15, 1901, 31 Stat. 790,[1] which

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[1] In addition to the powers granted by the Act of Mar. 3, 1905, the Secretary of the Interior also had the additional power granted by the Act of February 15, 1901, relating to rights of way through reservations, etc.

This Act provided:

> That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the ...

(continued...)

applied generally to public lands and

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[1](...continued)

> reservations of the United States ... for electrical plants, poles, and lines for the generation and distribution of electrical power ... and for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits, and for ... *dams*, and reservoirs used to promote [certain commercial activities] or any other beneficial uses to the extent of the ground occupied by ... electrical or other works permitted hereunder, ... by any citizen, association or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said ... Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such ... reservation falls and upon a finding by him that the same is not incompatible with the public interest ... *And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or by his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any ... reservation....*

31 Stat. 790 (1901) (emphasis added).

reservations. Such permit, however, would have been revocable at the discretion of the Secretary. *Id.* Moreover, it would not have included the right to the *use* of the river's water. *Id.* Unwilling to invest in building a power dam under these circumstances, Wilson enlisted the help of Representative Jones of Washington, the Congressman for the district, to sponsor a bill, which was enacted, "[p]roviding for the acquirement of water rights ... [and] land ... for sites for power purposes and the beneficial use of said water, and for other purposes." 33 Stat. 1006 (1905).[2]

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[2] The 1905 Act provides:

> *An Act Providing for the acquirement of water rights in the Spokane River along the southern boundary of the Spokane Indian Reservation, in the State of Washington, for the acquirement of lands on said reservation for sites for power purposes and the beneficial use of said water, and for other purposes.*

(continued...)

[2](...continued)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, be acquired by any citizen, association, or corporation of the United States by appropriation under and pursuant to the laws of the State of Washington.

Sec. 2. That the Secretary of the Interior be, and he hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the *erection* of suitable water, electrical, or power plants, *dams,* wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water: *Provided,* That no lands shall be granted under this Act until after the Secretary of the Interior is satisfied that the person, association, or company applying has

(continued...)

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[2](...continued)

made said application in good faith and *with intent and ability to use said lands for the purposes above specified* and that it requires the quantity of lands applied for in such use, and in case objection to the grant of said land shall be made, the said Secretary shall afford the parties so objecting a full opportunity to be heard.

Sec. 3. That the compensation to be paid for said land by said applicants shall be determined in manner prescribed in Section Three of the Act of March second, eighteen hundred and ninety nine, entitled "An Act to provide for the acquiring of rights of way by railroad companies through Indian Reservations, Indian lands, and Indian allotments, and for other purposes."

Sec. 4. That if the land allotted in severalty to any individual Indian which has not been conveyed to the allottee with full power of alienation be granted to any such appropriator, the Secretary of the Interior is empowered to use the moneys received for such land so allotted in the purchase of other suitable lands for such allottee.

Sec. 5. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the proper execution and carrying into effect of this Act.

(continued...)

This bill applied only to the Spokane River along the southern boundary of the Spokane Indian Reservation and became the 1905 Act. It empowered the Secretary of the Interior to "*consent*" to citizens, associations and corporations of the United States acquiring "the use of the waters of the Spokane River" along the southern boundary of the Spokane Indian Reservation. The "right" to the use of this water was to be acquired, under the procedure provided for by the Act, by "*appropriation* under and pursuant to the laws of the State of Washington." It also empowered the Secretary of Interior to grant such appropriators "land" within the Reservation "for the erection of suitable water, electrical, or power plants, *dams*

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[2](...continued)

Pub.L. No. 173 ch. 1440, 33 Stat. 1006 (1905) (emphasis added).

... and other needful structures required for the development of power or for the beneficial use of said water." *Id.* § 2 (emphasis added).

Immediately after Congress passed the 1905 Act, Wilson took the initial step to appropriate a flow of 10,000 cubic feet per second at Little Falls pursuant to and in accordance with the laws of Washington, and applied under the 1905 Act to the Secretary of Interior to acquire the right to use the waters of the Spokane River at the point of appropriation and to purchase 100 acres of the Reservation on the north bank of the river. The Secretary of the Interior, on November 3, 1906, acting in accordance with the 1905 Act, granted the 100 acres and the right to use the waters by approving Wilson's application (J.A. 261-81). This approval constituted the "1906 permit."

Less than a year later, on July 8, 1907, Wilson sold his interests in the lands and water rights to Washington Power (J.A. 298-322). In 1908, the Company began construction of the hydroelectric development.

The dam was constructed by the Company without complying with sections 9 and 10 of the Rivers and Harbors Act, 33 U.S.C. §§ 401 and 403, as would have been required if the Spokane River at that time and place was a "navigable river ... of the United States ... or ... navigable ... wholly within [Washington]."[3] Washington

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[3] The Rivers and Harbors Appropriation Act at the relevant time provided:

> Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, *navigable river, or other navigable water of the United States* until the consent of Congress to the building of such structures shall have been

(continued...)

Power also developed the Little Falls plant on the opposite side of the river from the site originally contemplated by Wilson, and so used some lands of the

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[3](...continued)

obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie *wholly within the limits of a single State*, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

30 Stat. 1151 (emphasis added). As set forth below, we find that the Spokane River was not "navigable" within Washington.

Reservation that were not included in the interests assigned to the Company by Wilson. Thus Washington Power itself appropriated a flow of 10,000 cubic feet per second pursuant to the laws of the State of Washington.

On May 18, 1908, Washington Power applied under the 1905 Act to the Secretary of the Interior to acquire the right to use the waters of the Spokane River at the point of its appropriation and to purchase an additional eight acres of Reservation lands at the same point (J.A. 328-409). On August 29, 1908, an Assistant Secretary of the Interior endorsed the initial approval of this acquisition by the Commissioner of Indian Affairs (J.A. 435). This constituted the "1908 permit." The original Wilson grant was also resurveyed by Captain Webster, United States Army, and others (J.A. 531-32), and approved by the Secretary of

the Interior on May 6, 1910. The dam began producing electric power the same year.

The issue in this case is whether the present Commission correctly held, given the foregoing facts, that the present Federal Power Act, as enacted in 1920 and amended in 1935, requires Washington Power now to apply for and obtain a license in order to continue to operate and maintain the 1911 Little Falls hydroelectric development. We hold that under the exceptions contained in sections 23(a) and 23(b) of the Act, Washington Power is not required to apply for or to have any additional license or authority to continue to operate and maintain the existing Little Falls plant.

II. THE STATUTORY FRAMEWORK AND THE LAW OF APPROPRIATION IN WASHINGTON

Sections 23(a) and 23(b) of the Federal Power Act, 16 U.S.C. §§ 816 and 817, provide:

> Sec. 23(a) *The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted* or as confirming or otherwise affecting any claim, or as *affecting any authority* heretofore given pursuant to law ...

(41 Stat. 1075, 49 Stat. 846). Cf. 16 U.S.C. § 816 (emphasis added).

> (b) It shall be unlawful for any person, state, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the *navigable waters of the United States,* or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, *except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920,* or a license granted pursuant to this Act....

16 U.S.C. § 817 (41 Stat. 1075, 49 Stat. 896) (emphasis added). The first question

that must be addressed, is whether Washington Power prior to June 10, 1920, possessed a "valid existing right-of-way" to "operate, or maintain [a] dam" at Little Falls on the Spokane River. Since the critical language of the exception is in the disjunctive, it is not necessary to determine in addition whether the Secretary's action also constituted a "*permit*" to "construct [a] ... dam" (emphasis added).

[1] It is clear from the language of the 1905 Act and from the contemporary laws of the State of Washington, which Congress incorporated by reference, that Washington Power had acquired a "valid existing right-of-way" to construct, operate, and maintain the Little Falls dam by the time it began producing electricity in 1910.

The 1905 Act provides:

> That the right to the use of the waters of the Spokane River where the said River forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, be acquired by any citizen, association, or corporation of the United States *by appropriation under and pursuant to the laws of the State of Washington.*

Section 1, 33 Stat. 1006 (emphasis added). The 1905 Act sets out unambiguously Congress' intention as to the manner of acquiring the right to the use of these waters: *"by appropriation under and pursuant to the laws of the State of Washington." Id.* The 1905 Act thus incorporates by reference the state law of Washington as to the appropriation of water and makes it the congressionally mandated federal law governing the portion of the Spokane River bordering on the Spokane Indian Reservation. This was a

completely sensible course for Congress to take.

Appropriation is a fundamental doctrine of water law in the western states. This doctrine developed in California in the first decade after the American conquest. Congress had failed to prescribe any legislative rules to govern water use on the public lands of these new federal territories, so miners without title based their use of water on the simple but effective doctrine of first come, first served. The common law of England, based on ownership of land and riparian use of streams, based on ownership of land and riparian use of streams [sic], was generally ignored and another common law grew out of the customs and usages of the early American west, inspired principally by the paramount interest in mining precious minerals. The doctrine of appropriation, however, did

not govern the water rights of Indian tribes and pueblos under federal law or the proprietary rights of the federal government. *See generally* 1 W. Hutchins, *Water Rights in the Nineteen Western States* 13-20 (1971). When Wilson wanted to appropriate the flow of the Spokane River by building a dam across it, therefore, the rights of the Spokane Indians and the federal government stood in the way.

This case thus becomes clearer if we first consider how Wilson would lawfully have proceeded under the laws of Washington, as Congress directed, had he chosen to appropriate water from a nonnavigable river on public land not within a federal Indian reservation. The procedure for appropriating water in effect in Washington when the 1905 Act was passed was established by the Act of 1891, passed by the Washington State Legislature in its second year of existence. 1891

Wash.Laws c. 142. The Act of 1891 provided that the right to the use of the water of streams, lakes, and certain other named surface sources for irrigation, mining, manufacturing, domestic, or municipal purposes could be acquired by appropriation. The 1891 procedure remained in effect until 1917, when another statute superseded it. While the 1891 Act did not provide specifically for appropriation for the production of electric power, the Washington Supreme Court ruled in 1908 that the statute did not provide the exclusive means of exercising the appropriative right. Rather, water rights could be appropriated in the customary way, the statute only providing one means to prove and preserve the right. *Kendall v. Joyce,* 48 Wash. 489, 93 P. 1091 (1908).

The Washington Supreme Court, in one of its earliest water rights decisions, had already announced, moreover, the

essentials of a valid appropriation of water. Appropriation, the court stated, comprises the intent to take water, accompanied by some open, physical demonstration thereof, for some valuable use, followed up with reasonable diligence and consummated without unnecessary delay. *Ellis v. Pomeroy Improvement Co.*, 1 Wash. 572, 21 P. 27 (1889). Construction of a dam for hydroelectricity unquestionably may satisfy these requirements for a valid appropriation. Thus if Wilson had built his dam and power plant on a nonnavigable stream flowing through public land in Washington, *not on a federal reservation,* he would have, leaving the rest of the facts of this case unchanged, acquired a valid interest in the waters of that stream through appropriation under Washington law. This legal system was well-established by 1905 and it is

explicitly this body of law to which the 1905 Act referred.[4]

The existence of the *Spokane Indian Reservation* through whose lands flowed the Spokane River at Little Falls, however, obviously complicated the task of the would-be appropriator. In 1899, the United States Supreme Court ruled in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702, 19 S.Ct. 770, 774, 43 L.Ed. 1136 (1899), that the federal government could reserve the use of water originating on or flowing through land owned by the federal government from

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[4] The subsequent Water Code of 1917 recognized "the existing rights of any riparian owner, [and] any existing right acquired by appropriation or otherwise." Laws of Washington 1917, ch. 117 § 1. Also, that "the use of water which has been applied to a beneficial use would be and remain appurtenant to the land or place upon which the same is used." *Id.* § 39.

appropriation under state law.[5] This rule was affirmed in *United States v. Winans,* 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), and in 1908, the landmark case of *Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), followed this line of authority, and dealt specifically with the reservation against appropriation of water of a nonnavigable stream bordering the Fort Belknap Indian Reservation in Montana. In 1905, therefore, any appropriation at Little Falls under Washington state law would risk being trumped by the superior rights under the doctrine applicable to federal reservations. Any right arising from an attempt to appropriate water *solely* under Washington law from a stream flowing

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[5] Since the Spokane Indian Reservation extended to the high water mark on the south bank of the River, the Tribe owned the river bed and the River flowed through the Reservation.

through a federal Indian reservation would have been precarious indeed.

Neither did statutory law provide much leeway to appropriators of water on Indian reservations. In the Act of February 15, 1901, 31 Stat. 790, previously referred to (see n. 1), Congress permitted the development of hydro-electric power on Federal reservations by authorizing the Secretary of Interior to permit the use of rights of way through public lands, forests, and other reservations of the United States, including Indian reservations, for electrical plants, poles, and lines for generation and distribution of electric power, as well as for "dams" used for any beneficial purpose. The 1901 Act, however, provided that any permission given by the Secretary of the Interior (the "Secretary") under the 1901 Act "may be revoked by [the Secretary] in his

discretion, and shall not be held to confer any right or easement, or interest in, to, or over any public land, reservation, or park." *Id.*

The 1905 Act, however, is a *special act* that granted greater and different rights than the 1901 Act. That was its purpose. It specifically authorizes the Secretary to grant land on the Reservation to appropriators of water *under the laws of Washington* for the "erection of electrical, or power plants, dams for the development of power or for the beneficial use of said water," 1905 Act, § 2, without conferring on the Secretary any right to revoke the right of way at will. The 1905 Act further adopts, *mutatis mutandis,* for the purposes of determining compensation, the Act of March 2, 1899, pertaining to "*rights-of-way* by railroad companies through Indian Reservations." 30 Stat. 990 (emphasis added).

[2] The special Act of the 1905 Congress thus served several purposes. By providing that rights in the waters of the Spokane River bordering the Reservation could be acquired, with the consent of the Secretary, in accordance with the laws of the State of Washington, it cleared away any obstacle for hydroelectric development that may have existed under the federal reservation doctrine, which as we have seen, potentially conflicted with the state appropriation law. It provided, moreover, a means to compensate residents of the Reservation for any damage done to their property by the construction of dams and other works. And finally, it increased the incentive and ability to develop the water power of the Spokane River by obviating the Secretary's discretion to revoke at will hydroelectric rights of way that might be granted to that river along the southern boundary of the Reservation.

Thus Congress clearly intended by the special Act to establish the framework by which hydroelectric developers could acquire the land on the banks, and the right to the use of the waters and the bed of the Spokane River to produce electricity.

This interpretation is confirmed by the language of the Act itself, its legislative history, and related statutory law. In the 1905 Act Congress authorized the Secretary of the Interior

> to grant ... land on [the Spokane Indian Reservation] ... such as shall be necessary and requisite ... for the erection of suitable ... electrical, or power plants, [and] dams ... required for the development of power or for the beneficial use of said water [upon showing to the satisfaction of the Secretary of Interior that the applicant had the] ... intent and ability to use said lands for the purposes above specified....

Act of Mar. 3, 1905, 33 Stat. 1006, § 2. The language of the Act clearly contemplates the grant of land by the Secretary for the specific purpose of constructing a dam, a reservoir and other works. The grant for that purpose implicitly confers on an approved applicant the right "to use said lands for [said] purpose"—otherwise the grant would be sterile and no federal law at that time prohibited such use. These grants constitute "rights-of-way" for the "erection of suitable ... electrical ... plants, dams, [etc.]" The Act also recognizes that the necessary water rights are to be "acquired ... by appropriation under the laws of Washington," provided that the applicant made the additional showing that he was able and intended "to use said lands for the [specified] purposes." Act of 1905, 33 Stat. 1006, § 2. All of this flows from the Act to be

administered by the Secretary of the Interior.

Section 3 of the Act, moreover, clearly indicates that Congress intended the Act to authorize the granting of rights of way. That section provides that "the compensation to be paid for said land ... shall be determined in the manner prescribed ... in the Act of [March 2, 1899, which provided] ... for the acquiring of *rights-of-way* by railroad companies through Indian reservations...." *Id.* § 3 (emphasis added). The Act of March 2, 1899 (30 Stat. 990) provided for railroad companies to acquire "rights-of-way" for the purpose of constructing railroads through Indian reservation lands and for the payment of compensation for damage caused by the "construction" of railroads. 30 Stat. at 990-92. It would be mysterious indeed if Congress relied on a statute that provided

compensation for damages caused by the "construction" of railroads as the model for a statute which, under FERC's attempted construction, did *not* authorize the "construction" of dams.[6] For if Congress did not intend dams and other works to be constructed on the "rights-of-way" it provided for, there is no explanation for its including a specific provision for the payment of compensation for damages caused by construction. What other construction would there be? No compensatory damage would result merely from the acquisition of unused rights of way and water rights.

The correct reading of the 1905 Act, of course, avoids this enigmatic and

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[6] The 1905 Act also parallels the 1899 Act in that both permit the Secretary of Interior to authorize construction on Indian reservations only after the Secretary has ascertained that the applicant has the resources necessary to carry through with the project, a statutory requirement that would make no sense under FERC's interpretation.

unreasonable construction. Congress intended to provide for the granting of rights of way for the construction of dams and the statutory means to compensate parties for any damage done to them by such construction, just as Congress had provided for with respect to the construction of railroads. To construe the 1905 Act now, eighty years later, as not authorizing the construction of the dam, which was the single purpose Congress passed the Act and for which the Secretary granted the land and consented to the acquisition and use of the necessary water rights in the first place, would frustrate the clear intent of Congress expressed in the 1905 Act and the sole reason for its enactment. The erection of a dam or dams for hydroelectric development was the express purpose for which grants of rights of way were authorized by the 1905 Act, and Wilson and Washington Power both

expressly requested authorization to exercise the right to construct a dam. *See infra* at 320-21. Indeed, as noted above, section 2 of the Act *required* an applicant to demonstrate the "intent and ability" to erect the necessary structures required for the development of power or for the beneficial use of the water before he could be granted or acquire any land or water rights.

A. The Legislative History

[3] The FERC rejects this appeallingly straightforward interpretation of the statute and contends instead that the intent of Congress cannot be interpreted as authorizing the actual building of a dam. The Commission's only plausible support for this view is the colloquy on the House floor, set forth in

the margin,[7] between Representative Jones

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[7] Water Rights in Spokane River.

Mr. JONES of Washington. Mr. Speaker, I ask unanimous consent for the present consideration of the bill (H.R. 15609) providing for the acquirement of water rights in the Spokane River along the southern boundary of the Spokane Indian Reservation, in the State of Washington, for the acquirement of lands on said reservation for sites for power purposes and the beneficial use of said water, and for other purposes, which I send to the desk and ask to have read.

The Clerk read as follows:

Be it enacted, etc., That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may be acquired by any citizen, association, or corporation of the United States by appropriation under and pursuant to the laws of the State of Washington.

Sec. 2. That the Secretary of the Interior be, and he hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same

(continued...)

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[7](...continued)

remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical, or power plants, dams, wing walls, flumes or other needful structures required for the development of power or for the beneficial use of said water: *Provided*, That no land shall be granted under this act until after the Secretary of the Interior is satisfied that the person, association, or company applying has made said application in good faith and with intent and ability to use said lands for the purposes above specified and that it requires the quantity of land applied for in such use, and in case objection to the grant of said land shall be made the said Secretary shall afford the parties so objecting a full opportunity to be heard.

Sec. 3. That the compensation to be paid for said land by said applicants shall be determined in the manner prescribed in section 3 of the act of March 2, 1899, entitled "An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes."

Sec. 4. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the

(continued...)

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[7](...continued)

proper execution and carrying into effect of this act.

The SPEAKER. Is there objection?

Mr. DALZELL. Mr. Speaker, reserving the right to object, I would like to have some explanation of this bill.

Mr. JONES of Washington. Mr. Speaker, the Spokane River forms the southern boundary of the Spokane Indian Reservation for a considerable extent. There is quite a fall in the river. There are considerable rapids there which would furnish splendid water-power facilities to the land on the north side. Being an Indian reservation there is no way by which sites for power purposes could be acquired. Our supreme court also has held that the riparian doctrine with reference to water holds in our State, and the question of the acquirement of water rights on the reservation is a matter of some doubt. This bill simply authorizes the acquirement of water rights on the reservation side of the river under the laws of the State of Washington, and the committee has put in a further restriction that it must be with the consent of the Secretary of the Interior. In order to secure sites for water-power purposes there is no law now under which the title to these sites can be secured. There is a law enabling companies to secure permits or

(continued...)

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[7](...continued)

licenses; but of course they would not want to expend large sums of money on a mere license or permit, so this bill authorizes the acquirement of title to this land under the procedure of law by which railroads can acquire rights of way through reservations. The money is to be paid to the Treasury for the benefit of the Indians, and the amendment suggested by the committee is that if any allotment is taken the sum received can be used by the Secretary of the Interior in the purchase of other suitable land for such allottee.

Mr. DALZELL. How is the water power to be used, by dams in the river?

Mr. JONES of Washington. They will probably dam the river. This is a matter they are willing to take care of at some future time. I will say, however, that the War Department had the matter investigated, and I know from personal observation that that part of the river is *not navigable*. This is simply a matter in reference to Indian lands, however, and the acquirement of water rights.

Mr. DALZELL. From what committee is this bill reported?

Mr. JONES of Washington. From the Committee on Indian Affairs. It simply affects Indian lands and provides means by which persons can acquire permanent rights.

(continued...)

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[7](...continued)

Mr. LOVERING. Does it carry the right to dam the river?

Mr. JONES of Washington. Oh, no; not at all. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.

The SPEAKER. Is there objection? [After a pause.] The Chair hears none.

Mr. JONES of Washington. Now, Mr. Speaker, in the amendment as section 4 the word "appropriation" should be "appropriator," and I will move the amendment.

The SPEAKER. The Clerk will report the amendment. The Clerk read as follows: Amend the amendment as section 4 by striking out the word "appropriation" and insert the word "appropriator."

Mr. STEPHENS of Texas. Do you accept the committee amendment?

Mr. JONES of Washington. Yes. The question was taken on the amendment to the amendment, and it was agreed to.

The SPEAKER. The question now is on agreeing to the committee amendment. The question was taken, and the amendment was agreed to.

The bill as amended was ordered to the engrossed and read a third time; and was read

(continued...)

of Washington, the author of the bill (H.R. 15609), and Representatives Dalzell and Lovering on February 11, 1905, the day the House passed the bill. The Act itself is sufficiently clear on its face so as not to require or authorize recourse to legislative history. *United States v. Oregon,* 366 U.S. 643, 648, 81 S.Ct. 1278, 1280, 6 L.Ed.2d 575 (1961); *Aviation Consumer Action Project v. Washburn,* 535 F.2d 101, 106 (D.C.Cir.1976). However, even the legislative history undergirds the view that the Act contemplated the construction of a dam, as careful examination of the colloquy between Congressmen Jones and Dalzell and Lovering reveals.

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[7](...continued)
the third time, and passed.

On motion of Mr. JONES of Washington, a motion to reconsider the last vote was laid on the table.

39 Cong.Rec. 2413 (1905) (emphasis added).

In this colloquy, Mr. Dalzell first inquired "How is the water power to be used, by dams in the river?" Mr. Jones of Washington replied:

> They *will probably dam the river*. This is a matter they are willing to take care of at some future Time. I will say, however, that the War Department had the matter investigated, and I know from personal observation that that part of the river is *not navigable*. This is simply a matter in reference to Indian lands, however, and the acquirement of water rights.

39 Cong.Rec. 2413 (1905) (emphasis added). From the foregoing exchange, it is clear that Jones plainly told Congress that erecting a "dam [in] the river" was more than a possibility, it was a *probability* that "they [Wilson and later the company] are willing to take care of at some future time." In making this representation to Congress, Representative Jones gave the House (and us) the underlying explanation why the Bill took the form it did. He

stated categorically that "the War Department had the matter [navigability] investigated and [Rep. Jones] knew from personal observation that that part of the [Spokane] river is *not* navigable" (emphasis added). Had the river been navigable, the consent of the Secretary of Interior would probably not have been sufficient since the Rivers and Harbors Appropriation Act of 1899 required the consent of Congress and the Army Corps of Engineers before a party could lawfully obstruct a *navigable* stream with a dam. Since the river was not navigable, however, as we discuss below, the consent of Congress and other requirements of the Rivers and Harbors Act were not applicable.

Representative Jones then stated to Congress that the bill "simply affects Indian lands and provides means by which persons can acquire the *permanent rights*."

See note 7 *supra* (emphasis added). This expression of congressional intent indicates that the interests in the lands that would be granted by the Secretary of the Interior to erect dams, acquire water rights, etc., pursuant to this special Act of March 3, 1905, would be "permanent" rights so long as they were used for the purposes Congress empowered the Secretary to approve. The Reservation lands ran to the high water mark on the south side of the River and thus the grant included the river bed sufficient to erect the needed dam, since the applicants already owned the contiguous land on the south bank necessary for the dam.

The colloquy then continued to the point where Jones made the remark upon which the Commission relies so heavily:

> Mr. Lovering. Does [the bill] carry the right to dam the river?

> Mr. Jones of Washington. Oh, no; not at all. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.

Id. The FERC contends this exchange demonstrates that "the 1905 Act dealt with the granting of water and land rights, not the authority to build a dam." Brief of FERC at 16. This position ultimately leads the FERC to conclude that Washington Power was without authority to erect the dam in 1908-10 and that it has operated the dam for over 70 years without valid authority. This construction of Congressman Jones' remark is, however, too broad. It ignores the earlier statement by the bill's author that "[t]hey will probably dam the river." It also ignores the plain language of the Act. The reconciliation of these two statements, that "they will probably dam the River" and that the bill does not

carry the right to dam the river is in fact, however, not difficult.

We may begin with the unambiguous statement that Wilson and company *"will probably dam the river"* and that "they are willing to take care of [that matter] at some future time." Congressman Jones obviously took the inquiry of Congressman Lovering to be an inquiry directed to Committee jurisdiction. His reply to the inquiry whether "the bill [carried] the right to dam the river," was directed to whether the terms of the bill required it to be considered by the Committee on Interstate and Foreign Commerce which had jurisdiction over legislation involving *navigable* waters of the United States. Thus Congressman Jones' reply was indicating that the bill authorized "the acquirement of water rights" for which "[t]hey will probably dam the river," and that they could do this because "that part

of the river is not navigable." However, if in the future the "matter [of building a dam in navigable waters] came up [it] would have to go to the Committee on Interstate and Foreign Commerce." This interpretation reconciles both Congressman Jones' remarks and explains his reply in terms related to the jurisdiction of the Committee on Interstate and Foreign Commerce. Congressman Lovering of Massachusetts, the second member who inquired concerning the right to dam the river, was one of the more senior members of that Committee. 1905 *Congressional Directory* 182.

Congressman Dalzell, who questioned Congressman Jones as to whether the river would be dammed and from what committee the bill was reported, was a member of the Rules Committee. He was undoubtedly concerned with whether the bill was proper for consideration on the unanimous consent

calendar as well as whether the House committee with appropriate jurisdiction over the damming of navigable rivers had reported the bill. The bill had been reported out by the Committee on Indian Affairs and was being considered on the unanimous consent calendar. If the river was navigable, the Committee on Interstate and Foreign Commerce would have had jurisdiction; then Congressmen Dalzell and Lovering would have realized the bill had not come from the correct committee, and either could have stopped it by a single objection.

There was, moreover, a chance that in the future the "matter" of damming a navigable river would come up, since at the time the bill was being considered, an officer of the Army Corps of Engineers was conducting a navigability study of the river (J.A. 623). While Congressman Jones was confident from personal observation,

and his stated knowledge of the War Department investigation (39 Cong.Rec. 3413), that the river was not navigable, if the study determined it was, the Committee of Interstate and Foreign Commerce would have had to approve legislation authorizing obstruction of the stream. The river was not navigable, however, and the matter did not come up.

The House therefore passed the bill on Congressman Jones' representation, based on the War Department's investigation and his personal observation, that the river was not navigable. The bill was passed by the House on February 11, 1905, 39 Cong.Rec. 2713, and 20 days later on March 2, 1905 by the Senate. 39 Cong.Rec. 3847. There was ample time after the House passed the bill and before the Senate passed it for the War Department to intervene and correct any inaccurate assessment of the

River's navigability. The fact that neither the War Department nor any other party attempted to stop this bill by claiming the river was in fact navigable, is strong evidence that no one in authority doubted that the river was *not* navigable. Since the bill passed both houses on the unanimous consent calendar, a single objection could have stopped the bill. *Id*. It should also be noted that the Army engineer advised, subsequently by letter of March 20, 1905 to the Army District Engineer at Portland, Oregon, that "the Spokane River is only navigable to Post Falls" (J.A. 623). Had the Army found the River to be navigable it could easily have stopped the Little Falls Development. The evidentiary record, however, demonstrates that the Army Engineers were cognizant of the development being implemented by the 1905 Act, they investigated the matter and saw

no basis for the exercise of their jurisdiction over any "navigable" water. *Id.*

[4][5] Congressman Jones was, in addition, correct in stating that the bill did not give any particular person the right to dam the river. The bill did not carry the *complete* right to dam the river, although the Act went as far in that direction as it could with respect to a river that was not a navigable river of the United States, unless Congress wanted to make established Washington water law inapplicable. Complete authority to dam the river, under the 1905 Act, was to be derived from satisfying the requirements of *both* federal and state law under the terms of the 1905 Act. Congress could grant the *land* including the stream bed upon which to erect the dam, but that was only part of the authority that was needed. It was still necessary under the

Act for the Secretary to consent and for the appropriator to obtain the right to use the waters of the Spokane River "*by appropriation* under and pursuant to the laws of the State of Washington" (emphasis added). Under the Washington statute, appropriation of water rights was not limited to any particular method. 1891 Wash.Laws ch. 142, § 1. Therefore it was permissible, in the absence of any controlling prohibition, to appropriate water by diversion, as Wilson intended, to be accomplished by a dam. His application to the Secretary of the Interior stated that the diverted water would be used, *inter alia,* for a power house, lighting plant and irrigation system (J.A. 267-68). Obviously any diversionary method would satisfy the statute. Thus the laws of Washington in effect in 1908-10, authorized *any* citizen or corporation of the United States that desired to

appropriate unappropriated water in a *non-navigable* stream to do so by the erection of a dam, provided he had the necessary consent and rights in the river bed and in any land that might be overflowed. *Griffith v. Holman,* 23 Wash. 347, 63 P. 239, 243 (1900) (the riparian owner has the right to obstruct a *non-navigable* river). Therefore, when the Secretary made the grant of the right of way in the land, and consented to the acquisition of the right to use the water by the erection of the dam, he authorized the construction of the dam in accordance with the intendment of the Act. No federal or state statute or decisional law, at that time, required a more specific "permit" to build a dam to divert nonnavigable waters under such factual circumstances. The principal objective obstacle here for Wilson was to acquire a sufficient right of way interest in the

land constituting the river bed, and the appurtenant riparian and other rights of the Spokane Indian Tribe and the United States, to erect a dam. The 1905 Act provided for the attainment of all such objectives by authorizing the Secretary to "consent" to the acquisition of water rights by Wilson and Washington Power and to "grant" them, as appropriators, the necessary rights of way.

Thus, when Representative Jones replied to Representative Lovering's inquiry as to their "right to dam the river" that "[t]hey have to take their chances on that," he was in fact giving a plain description of the legal procedure that the applicants had to go through to secure their complete right to dam the river under the terms of the 1905 Act. Not only did the pending 1905 navigability study raise a potential uncertainty; there were uncertainties inherent in the legal

procedure of appropriation. The "chances" Wilson had to take included the possibility that others might precede him in appropriating the water and thus under Washington appropriation law, 1891 Wash.Laws, ch. 142, § 1, be "first in time [and] the first in right" with respect to the water rights.

[6] Speed in appropriation therefore was essential if Wilson was to be successful in making good the chances that were available to him. Realizing all this, Wilson acted quickly. The Congressional Bill was signed by the President on March 3, 1905, in Washington, D.C. On March 8, 1905, "on a scrubby pine tree" over 3,000 miles away, Wilson posted his Location of Water Right "opposite to the head of what is known as the Little Falls of the Spokane River" (J.A. 178). And promptly at 8 o'clock the next morning, the 9th day of March, 1905, Wilson filed for record a

copy of this "Water Right" with the County Auditor of Lincoln County (J.A. 178). That Wilson acted with such promptness indicates that he was clearly aware he had to be the first in acquiring his water right if he were to secure the right to dam the river. This procedure of posting and filing was sufficient under Washington law to *initiate* the appropriation of "10,000 cubic feet per second of the flow of water in the Spokane River" at the approximate point of posting, i.e., at the Little Falls.

[7][8] It is not necessary to outline further the timing of the subsequent steps that led to the construction of the dam and the related power plant that perfected the Company's appropriation. It is only essential to realize that, following the enactment of the 1905 Act, it was the consent and approval of the Secretary *and* compliance with the laws of Washington and

the rights Wilson acquired by compliance with *both* laws that gave Wilson the final right to excavate and construct the dam to store and divert the waters of the Spokane River at Little Falls. Since the river was *not* navigable, it was, after the 1905 Act, the Secretary's approval *and* Washington law that provided the means both necessary and sufficient to perfect the right to construct the works at Little Falls. The final act perfecting the "appropriation" of the water was the erection of the dam and the *diversion* of the water to "use" in the electrical power plant. This or some other eventual "use" was essential under Washington law, as incorporated into the 1905 Act, or else the water right would be lost. Moreover, water appropriated for one purpose could be changed "to any other beneficial use." *Id.*, § 9.

III. THE INTERPRETATION OF THE 1905 ACT BY THE SECRETARY OF THE INTERIOR

The belated construction of the 1905 Act that the Commission now advances for the first time is also clearly at odds with the contemporaneous and subsequently continuous interpretation by the Department of Interior, which was charged with administering the 1905 Act. 1905 Act, § 2. The express terms of the 1905 Act are on their face quite clear: They show that Congress intended the Spokane River on the southern border of the Reservation to be developed to produce electricity, i.e., "for sites for power purposes ... erection of ... electrical or power plants ... development of power." *Id.* In addition, the contemporaneous interpretation of the 1905 Act by the Department of the Interior provides additional support for the interpretation of the statute presented above.

In his letter of May 4, 1906, to the Commissioner of Indian Affairs, Secretary of the Interior E.A. Hitchcock wrote:

Sir:

> I have considered your communication of the 4th ultimo, submitting the papers in the matter of the application of David Wilson, of Spokane, Washington, for the right to use the waters of the Spokane River, and for the acquirements of land on the Spokane Indian Reservation, for sites for power purposes and other beneficial use of the waters of said river.
>
> By Department letter of November 11, 1905, the Department returned Mr. Wilson's application, with accompanying papers, and advised you that the same would be further considered when amended so as to conform to Department regulations prescribed under the Act of March 3, 1905.
>
> With your said letter of the 4th ultimo you submit an amended application filed by Mr. Wilson under date of January 24, 1906, to conform to the regulations referred to, particularly describing the land desired to be acquired and purchased; and

applying also for the right to erect and maintain any and all suitable water, electrical or power plants, etc., required for the development of power for the beneficial use of the waters of the Spokane River; also for the right to build a dam at the points designated on the map accompanying the said application, and marked "site for dam No. 1," and "site for dam No. 2," reserving to himself the right to hereafter determine at which of said two sites he will erect the dam. The applicant sets forth that he is seeking to acquire the land and water rights in good faith, for the purpose of making certain improvements and developing power, as soon as the rights sought shall be obtained, and the state of the water will, permit; said improvements to consist of a *dam,* power house, flumes, penstock, turbines, electrical generators, transformers, and the necessary pole line to market said power, and all the other requisites to the construction and establishment of a modern electrical power and lighting plant....

* * *

From a careful examination of all the papers submitted, it

> appears that the amended application of David Wilson is in accordance with the requirements of the Department, as set forth in the regulations approved October 3, 1905, prescribed under the Act of March 3, 1905; that he has submitted satisfactory showings as to his financial business and executive ability, and that he actually intends to develop and use the power at the site and for the purposes specified.
>
> In view of all the facts shown in the papers, therefore, and in accordance with your recommendation, *the said application of David Wilson is approved*....

(J.A. 230-32) (emphasis added). The italicized language above places it beyond doubt that the Secretary of the Interior interpreted the Act to authorize him to "consent" to Wilson's application to use the waters, to grant him "the land and water rights" on the Spokane River Indian Reservation, to confer on Wilson "the right to erect and maintain" whatever facilities were necessary to develop the

river for hydroelectricity, "to build a dam" and other improvements necessary to produce and transmit electricity and to *approve* Wilson's application for all the foregoing purposes. *Id*. It is also clear that the Secretary determined Wilson's application conformed to the requirements of the applicable regulations and that Wilson had applied in conformance with said regulations for authority to build a hydroelectric dam. The contemporaneous regulations promulgated by the Department of the Interior, Office of Indian Affairs, on September 28, 1905 in every paragraph breathe their interpretation of the 1905 Act as authorizing the construction of power dams, etc., and as imposing the obligation on the Department of the Interior to pass upon applications therefor and to approve those that comply

with the Act and the regulations.[8] The

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[8] The September 28, 1905 Regulations provided that no applicant could "acquire any rights to the *use* of the waters of the said Spokane River, or to the *use* of the lands in the said Spokane Indian Reservation, under the provisions of this Act, until application therefor [and approval] by the Secretary of the Interior." (Section 2). To obtain such rights applications were required "to describe ... *the area of overflow lands involved* and the extent and dimensions of the *site for proposed works*, and ... such other material facts as to *the possibilities of the development of power* as will furnish data upon which to base an estimate of the value of the rights sought to be acquired." (Section 3).

"Seventh. A map ... showing the location and extent of ... *overflow lands* and sites proposed to be occupied by buildings or other *structures* necessary to be used in connection with the *proposed works and showing in detail the proposed elevation of waters to be contained or controlled*.... Eighth. Evidence of the compliance ... with the laws of the State of Washington concerning the *acquirement* of water rights.... Ninth. A statement of the approximate amount of water flowing in the Spokane River *at the point of diversion or appropriation*.... Tenth. Satisfactory evidence of the good faith of the company and its financial ability in the matter of the *construction of the proposed works*." *Id.*

"4. Upon the approval of an application ... the Indian Service will be designated to *appraise the damages*, tribal and individual, arising by reason of the taking of lands and of *the location and proposed construction of the works*....

"5. No work of construction of any character will be permitted until compensation for the lands to be taken and

(continued...)

Secretary approved Wilson's application and in so doing interpreted the 1905 Act as conferring on the Secretary the authority to make such grants. While Wilson's right of way was later amended upon application by the Company to include additional land necessary for the facility, nothing subsequently occurred to cast doubt on the Secretary's clear approval of Wilson's application to develop the river, which explicitly included, *inter alia*, the right to build, operate, and maintain a dam.

It is clear to this division of the court that the Act authorized the Company

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[8](...continued)
damages done or to be done shall have been determined and paid in manner as herein provided.

"6. The foregoing regulations shall be observed ... by any individual seeking to acquire the rights authorized under the provisions of this act, and particularly as to the purpose, intent, and *financial ability of the applicant.*"

(J.A. 941-46).

to acquire all the necessary "right of way," and that dual compliance with the 1905 Act and the laws of the state of Washington, as embodied in the 1905 Act, authorized the Company to dam the nonnavigable waters of the Spokane River and thereby appropriate the beneficial use of its waters for power purposes.

[9] It is not clear from the record whether the dam ultimately constructed, maintained, and operated by Washington Power occupied either one of the two precise locations for dams on the Spokane River indicated on the map approved October 3, 1905, by the Secretary. *Compare* Exhibit 81 *with* Exhibit 116 (by comparing the maps showing the location of the present dam with that showing the approved sites it is impossible to tell whether the dam was built exactly on approved sites

Nos. 1 or 2).[9] Even if the dam Washington Power ultimately built, however, was not precisely at Dam Site No. 1 or No. 2, as marked on Exhibit 81, the land and other rights granted by the Secretary to Wilson would still be valid as to the existing dam and other structures at Little Falls. Wilson applied to the Secretary for the right not only to build dams at the marked sites, but

> [a]lso the right to erect and maintain any and all suitable water, electrical or power plants, dams, wing-walls, flumes and other needful structures required for the development of power for the diversion of water for irrigation and other beneficial use of said water ...

(J.A. 500). Thus the approval of the application was broad enough to include the dam notwithstanding any minor

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[9] The two sites were within 700 feet of each other and it is clear that the dam was erected at the approximate location that had been approved.

deviation from the marked sites. The Acting Commissioner of Indian Affairs in his letter of transmittal accompanying Wilson's application also reemphasized to the Secretary that Wilson was applying for the right to build a dam (J.A. 506).[10] The Commission's present ruling that the 1905 Act did not authorize the Secretary to authorize the building of dams thus bluntly contradicts the contemporaneous interpretation of the Act by the Secretary and the Commissioner of Indian Affairs.

The Commission's present ruling that the 1905 Act did not authorize Wilson or

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[10] [Wilson] prays further for the right to erect and maintain any and all suitable water, electrical or power plants, dams, wing-walls, flumes and other needful structures required for the development of power, for the diversion of water for irrigation and other beneficial use of said water, and to dam and back up the said water by building a dam at the point designated on the map "dam", giving, as alleged, approximately, one hundred feed [sic] head.

(J.A. 506).

his successors to "*occupy*" the River is equally inconsistent with the Secretary's contemporaneous interpretation. To the contrary, the Department of the Interior had approved Wilson's application "to occupy and improve said waters and the land necessarily incident thereto" (J.A. 180) (emphasis added). *Washington Water Power Company* 25 F.E.R.C. ¶¶ 61,002, 61,0027 (1983) (Butler, Chrmn., dissenting).

Wilson subsequently transferred all his water rights, which included the rights to build and maintain dams and other structures, to Washington Power.[11] The Commission would not have been able to reach the issue not passed upon by the ALJ, namely whether the 1905 Act granted

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[11] See Exhibits 28-30 (J.A. 298-322), 45 (J.A. 422-427), 49 (J.A. 431- 436), 54 (J.A. 444-445), 59 (J.A. 466-524), 62 (J.A. 527-529), 73 (J.A. 534-535) for full documentation of the transfer of rights from Wilson to Washington Water Power.

the authority to build the Little Falls Dam at all, had it not held the transfer was valid. *See* Brief of Respondent at 8. The Commission has thus conceded that the transfer was valid.[12] This transfer may be viewed as having been approved by the Secretary and, as the Commission notes, the Company "informed the Secretary ... of the transfer and did everything necessary to obtain a permit for itself." Indeed,

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[12] The reasoning the Commission applied in approving this transfer was correct, even if it exceeded its authority in reviewing a transfer that had already been approved by the Department of Interior, the agency in charge of approving such transfers under the 1905 Act. This transfer included the transfer of the right to operate and maintain a dam, which was explicitly part of the Wilson's 1906 approved application. Moreover, sections 23(a) and 23(b) expressly prohibit the Commission from "affecting" the transferable "right of way" held by Washington Power by unlawfully rendering it non-transferable. The actions of the Secretary of Interior have already conclusively demonstrated that the rights held under the 1905 Act are transferable. It is therefore absolutely clear that the Department of Interior held that it could issue to Wilson a right of way to build and maintain a dam at Little Falls, and that such right was transferable.

the 1905 Act in section 4 gives the Secretary broad authority to enforce the Act. This includes the authority to regulate any transfers of rights granted by the Secretary under the 1905 Act.

[10][11] In passing on Wilson's application it was necessary for the Department of the Interior to interpret the 1905 Act and it is clear that the Secretary interpreted that Act alone as permitting the granting of the rights to use water and land, to approve the building of the dam on non-navigable waters, and to transfer these rights. The agency empowered to administer the 1905 Act thus made a contemporaneous interpretation of the Act to which the Commission should have deferred. It is well-settled that "the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum v. Bacon,* 457 U.S. 132,

141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982), *quoted in Aluminum Company of America v. Central Lincoln Peoples' Utility District,* 467 U.S. 380, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984); *Chevron U.S.A. v. Natural Resource Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). This doctrine of deference is particularly sound law in this case. The Department of the Interior, which interpreted and administered the 1905 Act, had longstanding experience in administering similar statutes, as was later demonstrated by the opinion of the Secretary of the Interior expressed in the May 10, 1923 reconsideration of the May 1, 1923 patent issued to Big Bend Transit Company (J.A. 538-45). *See also United States v. Big Bend Transit Co.,* 42 F.Supp. 459 (E.D.Wash.1941). In this opinion by the Secretary he interpreted the 1905 Act as a right of way statute for the

construction and operation of a hydroelectric dam and related facilities on the right of way granted at Little Falls and to regulate the transfer of such rights. Since the Little Falls Development had been completed at that time, his opinion confirms our foregoing analysis that the 1905 Act authorized the Secretary to confer such rights and to authorize such construction. Such interpretation is supported by the plain language of the 1905 Act itself.

The contemporaneous interpretation of the Department of the Interior is all the more to be deferred to in a case like this, where the statute and its interpretation by the Agency is almost eighty years old. Present day constructions of an old statute are likely to be inaccurate for the obvious reason that the older a statute is, the more difficult is the task of reconstructing

the Congressional intent. It is not for the Commission, eighty years later, to attempt now to critique the niceties of how the Secretary of the Interior, in his discretion, fulfilled the mandate of the 1905 Act while it was still fresh in minds of the Congressmen who passed it and agency officials who were designated to enforce it and similar statutes. As Mr. Justice Cardozo observed,

> [Administrative] practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.

Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796 (1933) (citation omitted). *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n. 17, 101 S.Ct. 817, 823 n. 17, 66 L.Ed.2d 762 (1981); *Trafficante v.*

Metropolitan Life Ins. Co., 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1972); *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1539, 6 L.Ed.2d 924 (1961). Indeed, the construction the Commission presently attempts to blithely circumvent the clear intent of the 1905 Act, is itself strong evidence of the dangers of reinterpreting statutes, so long after they have been enacted, interpreted, and relied upon by private parties and agencies alike.

IV. THE APPLICATION OF THE FEDERAL POWER ACT

[12] It is of the utmost importance to realize that the rights of the Washington Water Power Company in this case are based on a *special* Act, and that a special act prevails in effect over more general acts. *Brown v. GSA*, 425 U.S. 820, 834-35, 96 S.Ct. 1961, 1968-69, 48 L.Ed.2d 402 (1976); *Morton v. Mancari*, 417 U.S.

535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974) (citing cases); *Preiser v. Rodriguez,* 411 U.S. 475, 489-90, 93 S.Ct. 1827, 1836, 36 L.Ed.2d 439 (1973); *Fourco Glass Co. v. Transmirra Corp.,* 353 U.S. 222, 228-29, 77 S.Ct. 787, 791-92, 1 L.Ed.2d 786 (1957); *Townsend v. Little,* 109 U.S. 504, 512, 3 S.Ct. 357, 362, 27 L.Ed.2d 12 (1883); 2A C. Sands, *Sutherland Statutory Construction* § 51.05 (4th ed. 1984). In fact, the 1905 Act is a very "special act" being limited solely as it is to the relatively small area of the Spokane River on the southern boundary of the Spokane Indian Reservation. A construction of the more general Federal Power Act, or the Rivers and Harbors Act which had the effect of rendering the special 1905 Act void would thus be highly suspect. Having settled that the 1905 Act authorized the Secretary to grant parties the necessary rights of way and approval

to build, maintain, and operate the Little Falls facility, "in the Spokane River along the southern boundary of the Spokane Indian Reservation," *see* n. 2, the central question of this case becomes whether these rights fall within the exception recognized and granted in sections 23(a) and 23(b) of the Federal Power Act. FPA, 16 U.S.C. §§ 816 and 817.

Clearly, the right to maintain and operate the Little Falls development is based on a "valid existing right-of-way [previously] granted" that falls within these exceptions. The Department of the Interior interpreted the 1905 Act when that agency reconsidered Washington Power's application for a patent. Having compared the Act of February 15, 1901, 31 Stat. 790, to the 1905 Act which authorized the granting of permanent rights of way, etc., Secretary Hubert Work wrote:

> The fundamental differences, then, between the two acts, are that whereas, by the act of 1901 the right conferred is that of a *mere permit,* revocable by the Secretary of the Interior, under the Act of 1905 (in all respects similar to the act of March 3, 1891, 26 Stat. 1905, in the matter of the extent and nature of the grant, and jurisdiction to terminate the same), such right is a limited fee on an implied condition of reverter in the event the grantee ceases to use or retain the land for the purposes indicated in said act of 1905, *supra,* the termination of which *right of way* or limited fee is not vested in the Secretary of the Interior, but may be effected, upon good cause being shown, only through proceedings had without the jurisdiction of the Department of the Interior, see, in this connection, *Kern River Company v. United States* (257 U.S. 147 [42 S.Ct. 60, 66 L.Ed. 175]). *In other words, both the acts of 1901 and 1905 are right of way acts; the former general in its nature and application, the latter special in its nature and application.*

(J.A. 542) (emphasis added). Thus it is clear that the Department interpreted the

1905 legislation as a special Act authorizing the establishment of valid *"rights of way"* which included authorization to "consent" to the building and maintenance of a hydroelectric dam, which was granted well before June 10, 1920.[13] It is significant that this opinion of the Department rendered on May 10, 1923, is a contemporaneous interpretation of the Federal Water Power

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[13] The above quotation is merely one of many that could be cited to the same effect. In fact, the record is so replete with references to "dams," "power sites," "construction" and so on that it is absolutely clear that the Department of the Interior, the Commissioner of Indian Affairs, the Indian Agents in the field and all other parties involved in the enforcement of the 1905 Act understood it to authorize the construction, operation and maintenance of a power dam and other structures necessary to produce power. These documents are set forth as *Appendix Document No. 9 to the Reply Brief of the Petitioners*, and constitute overwhelming evidence that all the federal officials responsible for administering the 1905 Act construed it to authorize the construction, operation and maintenance of a dam.

Act of 1920 and its application to rights granted under the 1905 Act.

The Commission, however, now proposes a different analysis of the 1905 Act and its relation to sections 23(a) and 23(b) of the Federal Power Act. FERC first states part of the legislative history of sections 23(a) and 23(b): Those sections of the bill as originally introduced provided for "*revoking* any permit or valid existing right of way heretofore granted or as *revoking* any authority heretofore given pursuant to law" instead of prohibiting their being construed "as *affecting* any permit or valid existing right of way ... or ... authority" (emphasis added). On June 25, 1919, Gifford Pinchot, revered as one of the fathers of the conservation movement, suggested changing "revoking" to "affecting" in order to make it clear that *revokable* permits (like that created by

the 1901 Act from which the 1905 Act departed) would not become irrevocable by virtue of the passage of Federal Water Power Act of 1920, 41 Stat. 1075 (1920) ("FWPA"). The Commission now states in its current Opinion No. 117A that the language of section 23(a) was intended neither to diminish nor enlarge rights held under pre-FWPA permits. 25 F.E.R.C. ¶ 61,002 at 61,014. Thus, FERC rules in its current Opinion No. 117 that Washington Power could continue to occupy lands of the Spokane Indian Reservation and utilize waters of the Spokane River for the Little Falls development, but could not continue to operate and maintain its dam without a license under section 23(b). In the Commission's view, this would be an "enlargement" of the original 1906 and 1908 permits. This result, the Commission contends, "strikes a balance between preserving the authority of the pre-FWPA

permits, and refraining from enlarging that authority;" it contends, that is, that to uphold the Company's position would enlarge the right of way granted under the 1905 Act to construct and operate the dam. In fact, the Commission's argument refuses to recognize the full "right of way" authorized by the statute, which was granted and consented to by the Secretary, and then balances its misconstruction against a result which assumes the validity of its misconstruction. All the emphasis on "enlargement," etc., in reality is an attempt to impose a standard different from the statutory standard. The statute expressly prohibits the Commission from doing anything that could be construed as "affecting any authority" or "existing right-of-way." When that standard is applied, the Commission's construction clearly falls.

The Commission's position is that the right of way is separate from the right to *use* it. This is an incongruous outcome, since under the 1905 Act, and the laws of Washington providing for the appropriation of water rights that the 1905 Act incorporates, the right to the *beneficial use* of the water implicitly follows from the acquirement of the water rights and the land. The rights in the land were acquired by "grant" from the Secretary and the water rights were acquired by appropriation under the laws of *Washington* with the "consent" of the Secretary. The title of the Act indicates that its purpose is to provide for "the acquirement of water rights [and] lands ... for sites for power purposes, *and the beneficial use of said water*." The three go hand in hand. In keeping with the title, the first section of the 1905 Act provides: "The right to the *use* of the waters of the

Spokane River ... may with the consent of the Secretary ... be acquired ... by appropriation under ... the laws of ... Washington." The statute then continues: "the Secretary ... is authorized and empowered to *grant* such appropriator [of the water rights in the Spokane River] ... *land* ... such as shall be necessary ... for the erection ... [of] dams [etc.] required for the development of power or *for the beneficial use of said water....*" *Id.* § 2. "[T]he right to the *use* of the waters of the Spokane River" as provided for in the first section of the Act, is just another way of recognizing that the appropriator may *beneficially use* his water rights by "the erection ... [of] dams ... for the development of power." *Id....* As a practical matter, in the context of the statute, water rights and land, appropriated, consented to and granted "for the development of power,"

could not be *used* in any way other than by a dam.

The effect of the Commission's ruling would be to strip Washington Power of its *valid* right of way to operate and maintain the dam at Little Falls, and in effect to revoke that right. However, the applicable statutes the Commission relies upon recognize the continuing validity of any "valid existing right-of-way", FPA § 23(b), and provide that they "shall not be construed as *affecting* any permit or valid existing right of way ... granted prior to June 10, 1920 ... or as *affecting* any authority heretofore given pursuant to law." FPA § 23(a), 16 U.S.C. § 816 (emphasis added). For the Commission to require now, some 75 years after the completion of construction, that the Little Falls dam be licensed so that Washington Power may continue the "beneficial use" of its water rights

acquired by appropriation in 1906-10, clearly would "affect" the existing right of way in a very concrete way: It would deny Washington Power the right to the beneficial use of the waters diverted by the dam without further license. It would also drastically reduce the value of all the real property involved. The license the present Commission seeks to require Washington Power to acquire to operate and maintain the Little Falls facility would, if granted, expire after fifty years. Upon this expiration, the Little Falls development could be appropriated by the United States or transferred to some other party. Washington Power would need to be compensated in this event only according to the "net investment formula" which may well be much less than the market value of the transferable limited fee currently held by the Company.

[13] Thus the Commission proposes actually to obliterate the right of way for the beneficial use of its water rights that the Company currently holds, a limited fee with implied reverter for non-use, see *Big Bend Transit Co.*, 42 F.Supp. 459 (E.D.Wash.1941), by forcing it to apply for a license to run for a fifty year term, at the end of which the right to maintain and operate the dam would be up for license. This obviously *affects* the Company's right of way: Instead of having the right to use the "lands ... for [a] site[ ] for power purposes, and the beneficial use of said water" in perpetuity so long as it is used for the production of electric power or some other beneficial use, and the water so long as is consistent with Washington law, the Company would have merely the right to produce power for the term of the license. This would affect Washington Power's right

of way in a manner prohibited by sections 23(a) and (b) of the Federal Power Act. Therefore Washington Power is exempted by the statute from being required to apply now for a license to operate and maintain the Little Falls facility under the Federal Power Act because its "valid existing right-of-way [was] granted prior to June 10, 1920." FPA § 23(b), 16 U.S.C. § 817.

We need not reach here the question of what compensation would be due for the revocation or acquisition of Washington Power's property rights in the Little Falls hydroelectric development. No state, municipal or federal entity now seeks to condemn the property under eminent domain. Nor does Washington Power voluntarily seek to exchange its valid right of way for a license under section 23(a). And since this case holds that the Federal Power Act exempts Washington Power from being

required by the Commission presently to acquire a license for the Little Falls development under the Federal Power Act, we do not reach the issue of whether such a licensing requirement would be a "taking" under the Fifth Amendment to the Constitution. It is clear, moreover, that the existing development at Little Falls did not from 1911 on lack any necessary authority for its construction, operation or maintenance or for its continuing operation and maintenance. Washington Power is therefore not required to apply for or obtain a license. Thus it is not at present subject to the cost-based "net investment" formula, as the Commission concludes are projects without pre-FWPA authority.

It follows from this analysis that Washington Power therefore has the option, but is not required, to exchange its current right of way for a license under

the Federal Power Act. It should also be noted, however, that the right to occupy the river and to use the flow of the stream were acquired under the 1905 Act and Washington law and are property rights under that law. *Thompson v. Short,* 6 Wash.2d 71, 106 P.2d 720 (1940) (appropriative right is real property); *Tedford v. Wenatchee Reclamation Dist.,* 127 Wash. 495, 221 P. 328 (1923) (same); *Madison v. McNeal,* 171 Wash. 669, 19 P.2d 97 (1933) (right to appropriated water flowing naturally or in control works is an incorporeal hereditament). Since the 1905 Act, and subsequent enactments, incorporated these aspects of Washington property law by reference, Congress has already approved the acquisition of property rights in the water rights in the Spokane River acquired under the 1905 Act and the Washington law of appropriation. It is therefore clear that the present law

cannot be construed to authorize the federal government simply to seize this property without paying just compensation, any more than it could seize land which Congress had authorized the federal government to sell and which had already been sold to private parties, without paying just compensation.

V. NAVIGABILITY OF THE SPOKANE RIVER

In addition to contending that the Company must apply for a license because the Spokane River is, in fact, "now" navigable at Little Falls, the Commission also contends that the River was a navigable waterway of the United States in 1906-10 when the Secretary consented to and granted authority for the Little Falls development in accordance with the 1905 Act. We will deal with both contentions.

The river in its relevant stretches was not navigable when the Little Falls development took place. At that time the

provision of the 1905 Act authorized the construction and operation of the Little Falls dam and the "beneficial use" of the water rights appropriated under the laws of Washington.

The Spokane River starts as the outlet of Couer d'Alene Lake in Idaho and flows generally northwest for 105 miles to join the Columbia River in Washington at Mile 317 above the Snake River. From its source to its confluence with the Columbia it has a total fall of 1,075 feet. This represents an average fall of 10.2 feet per mile over its entire length. The river is navigable *within Idaho* from Couer d'Alene Lake for eight miles to Post Falls, Idaho, five miles east of the Washington-Idaho boundary, where there is a natural drop of 40 feet. This stretch of the river from the lake to Post Falls is not obstructed by rapids and in 1932 had a fair depth due to the back water from the

Post Falls dam. The floating of logs is the only commerce on this eight mile section of the river, which is entirely in Idaho.

[14] As will be developed subsequently, the 97 miles of the river below Post Falls was *not* shown to be navigable either in Idaho or Washington when Little Falls was developed. From the foot of Post Falls to the head of Spokane Falls in Washington, 20 miles west of the state line, the river flows through a comparatively wide and level valley but has an average fall of 10 feet or more per mile. Spokane Falls is a series of falls and cascades with a natural drop of about 150 feet. It is also relatively shallow except during the high water season. Logs had been floated from the lake to Post Falls in Idaho but there was no general practice of driving logs below Post Falls across the state line into Washington, so

far as this evidentiary record demonstrates, except occasionally in *high water* many years ago. As the 1932 Report of the Army Engineers states:

> It would be impractical either to row a boat or drive logs between Spokane and Post Falls during the low water season, which averages about five months a year, *on account of the many rapids and very shallow depth of water*. During the season of high water, about three months of the year, the velocity of the water is so great that commercial navigation would be impractical and uneconomical due to the excessive power that boats would require.... There is no record to indicate that the Spokane River has ever been used as a highway for interstate commerce, and the river is not generally and commonly useful in any trade or agriculture.

Ex. No. 87 (emphasis added). *Report of Army Engineers,* 1932 (J.A. 621). The floating of logs during *high water* does not establish that this stretch of the River is a "navigable" stream. *United States v. Rio Grande Dam & Irrigation Co.,*

174 U.S. 690, 698, 19 S.Ct. 770, 773, 43 L.Ed. 1136 (1899) ("The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of *high water* does not make it a navigable river") (emphasis added); 16 Am.Jur.2d 511, Waters, § 67 n. 65. A river is a navigable waterway of the United States if it constitutes a continuous highway capable of use for the purposes of transportation and commerce with other states or foreign countries in the customary modes in which such commerce is conducted by water or which may be made available for navigation given *reasonable* improvements. *The Daniel Ball,* 10 Wall. 557, 563, 77 U.S. 557, 563, 19 L.Ed. 999 (1871); *The Montello,* 20 Wall. 430, 441, 87 U.S. 430, 441, 22 L.Ed. 391 (1874); *United States v. Utah,* 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); *United States v. Appalachian*

Electric Power Co., 311 U.S. 377, 406-08, 61 S.Ct. 291, 298-99, 85 L.Ed. 243 (1940).

"Below Spokane Falls the river is not navigable and *never* was navigable except for short stretches."[14] This stretch of the river "flows through a deep canyon flanked by high lands" most of the way.[15] With an average drop of 10.8 feet per mile, the river thus flows with high velocity and its "bed ... is composed principally of boulders, which cause a great many rapids; and the river is also obstructed by numerous falls."[16] "No improvements of this river have ever (1932) been authorized by Congress."[17] The physical characteristics of the river, as

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[14] Report of Army Engineers, 1932; Ex. No. 87, ¶ 13 (J.A. 621-25).

[15] *Id.*, ¶ 5.

[16] *Id.*, ¶ 4.

[17] *Id.*, ¶ 14.

described in the official reports of the Army Engineers, thus made it nonnavigable from Post Falls to its mouth.

The Little Falls development is located on the Spokane River 70 miles below Post Falls, 45 miles below Spokane Falls and 29 miles from its confluence with the Columbia River (J.A. 637-42). According to the Report of the Army Engineers in 1932 there was no commerce on the Spokane River. The report further concluded:

> 17. Logs have been floated down the Spokane River to Post Falls; but there has been no general practice of driving logs below Post Falls, and the present practice of lumbering interests is to bring logs to their mills by either railroad cars or auto trucks.
>
> 18. With the exception of the one boat mentioned in [a] letter quoted in paragraph 13, there is no record of any boat traffic between Spokane and Post Falls.

> 19. If the river were ... useful, it would have been used for such purposes, especially in the earlier days of settlement before the development of other means of transportation. It is believed that the *physical characteristics* of the river explain the failure to use this river for purposes of navigation.
>
> 20. The navigable portion of the Spokane River, which is that portion between Post Falls and Coeur d'Alene Lake, lies wholly within the State of Idaho.
>
> 21. It is concluded that *the Spokane River is not a navigable waterway of the United States, because the interstate stretch—between Spokane, Wash., and Post Falls, Idaho—is neither used nor susceptible of being used in its ordinary condition as a highway for commerce.*[18]

The nonnavigable character of the Spokane River from its mouth to Spokane Falls is corroborated by the Report of April 21, 1882 by Lt. T.W. Symons, Corps of

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[18] *Id.* (emphasis added).

Engineers, U.S. Army, transmitted by the Secretary of War to the United States Senate in response to Senate Resolution of April 5, 1882, "[r]especting the navigable waters of the Upper Columbia River and its tributaries."

> The Spokane River ... flows through a cañon very similar to that of the Columbia, and about 2,000 feet below the general level of the plains to the south. It is broken by many rapids and falls, and is entirely unnavigable. From its mouth up to Spokane Falls, about seventy miles, this cañon is very deep and difficult to cross or traverse.

Ex. 159 (J.A. 766-70) (emphasis added). As indicated above at page 24, the nonnavigability of the Spokane River below Post Falls was also confirmed in 1905 by the Engineer on the ground (J.A. 623).

The War Department and the Army Corps of Engineers are the agencies that are directed to study and report on the nation's rivers, and they are empowered by

the Rivers and Harbors Act to approve plans for dams, bridges, etc., that would obstruct navigable rivers of the United States. Their duties included the investigations in the field necessary to determine whether streams were navigable waters of the United States and they carried out these duties with respect to the Spokane River. *See* n. 20, *infra*. Their official reports thus carry particular weight. The official U.S. Geological Survey maps of the Spokane River over its entire length, from Couer d'Alene Lake to its confluence with the Columbia 105 miles to the West, indicate that numerous railroad and highway bridges cross over the River. The River Mile Index of the Spokane River from Little Falls to Couer d'Alene Lake (undated) indicate that 32 bridges cross the river (10 railroad bridges and 22 highway bridges) (J.A. 637-42). Yet the official *List of Bridges*

Over the Navigable Waters of the United States, as compiled by the Chief of Engineers, United States Army, and revised to January 1, 1935, U.S. Government Printing Office, 1936, did not include *any bridge* over the "Spokane River."[19] This publication of the Army Engineers consists of 461 printed pages, and includes *every* railroad or highway bridge that crosses any navigable water of the United States. No where does this official publication mention the "Spokane River." The conclusion is inescapable from this, and all its prior Reports on the Spokane River, see n. 20, that the Army Engineers found that the Spokane River was *not* navigable.

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[19] We take judicial notice of the United States Geological Survey maps covering the Spokane River and the Army Chief of Engineers List of Bridges Over the Navigable Waters of the United States (1936) pursuant to Fed.R.Evid. 201.

If the Spokane River was a navigable water of the United States at the time the Secretary of Interior gave his consent to Wilson to appropriate and use the Little Falls water rights, and approved the several applications for rights of way necessary to build and maintain the dam, his actions may have been in violation of the Rivers and Harbors Act, 33 U.S.C. § 403. This Act requires that plans for building a dam that would obstruct a navigable waterway of the United States be consented to by Congress and approved by the Chief of Engineers and the Secretary of the Army. This was apparently not done in the case of the Little Falls dam. Thus, if the Spokane River was a *navigable* waterway of the United States at the time and place covered by the applications of Wilson and the Company, the Secretary of Interior's approval may have been insufficient under the Rivers and Harbors

Act. However, such approval was not required because the river was not navigable.

The Commission's error is in finding, without substantial evidence, that the Spokane River was navigable. The findings, conclusions and interpretations of the War Department and Army Engineers conclusively demonstrate that at the time the Little Falls facility was constructed the Spokane River was entirely unnavigable.[20] However,

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[20] In 1881, the War Department investigated the Spokane River and determined it was not navigable. Sen.Doc. No. 186, 47th Cong., 1st Sess., (1982); Exhibit 159 (J.A. 764-70). Pursuant to the Act of July 13, 1892, 27 Stat. 88, the Army Corps of Engineers undertook to determine whether the Spokane River was "worthy of improvement." The 1893 Annual Report of the Chief of Engineers concluded it was not. *See* Opinion No. 117A at 11 n. 9, 25 F.E.R.C. ¶ 61,002 at 61,024; Washington Power Supplemental Appendix, No. 2. In 1905, the District Engineers of the Army Corps of Engineers wrote that the river was not navigable downstream from Post Falls, Idaho (J.A. 623). In 1932, the Army Chief of Engineers, after an investigation, determined the river was not navigable (J.A. 621-25). The river was therefore officially determined to be non-navigable at Little Falls on four different occasions.

the Commission does not recognize any necessity to evaluate the evidence of the river's physical features, or to be influenced by the conclusions of the official Reports of the Army Engineers, which constitute the only reliable probative evidence presented on the issue of navigability—an issue that is largely determined by the facts.

The Commission's brief argues that the Spokane River has *always* been a "navigable waterway of the United States." FERC Brief, pp. 23-24. However, it advances no respectable evidentiary support for this conclusion. It claims reliance principally on some flotation of logs from Post Falls, Idaho to Spokane Falls, Washington in the early days; but it advances no substantial evidence that is sufficiently probative to conclude that such flotation supports a claim of navigability. It does not advance any

evidence from which it could be reasonably concluded that any logs were ever floated down river below Post Falls except during periods of *high water* and then only to a point *above* Spokane Falls. The Commission has not advanced one iota of evidence of any commerce of *any* character over the 70 miles of the River from Spokane Falls to its confluence with the Columbia. This is fatal to the Commission's claim. The Little Falls Development is on this stretch about 45 miles below Spokane.

The items of evidence that the Commission brief (pp. 23-24) relies upon to support its claim of navigability by the flotation of logs for the short distance from Post Falls to Spokane Falls are itemized and their complete deficiency as probative evidence pointed out in the margin.[21]

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[21] (1) First, the Commission cites Ex. No. 126, a pamphlet published in 1952 entitled "Steamboats in the (continued...)

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[21](...continued)
Timber." This contains a brief reference to a log drive in "early days" to McGoldrick's Mill not far above Spokane Falls *"in early spring"* (J.A. 735) (R. 1193-96), i.e., *high water time.*

(2) Exhibit 130 is a map *"allegedly"* identifying the Spokane River as a public highway for logging activities as declared by the Washington Legislature in 1875 (R. 1211, J.A. 750). However, while the entire river is "Declared Public Highway for Logging by Act of Washington 1875," it is only from Lake Couer d' Alene to Spokane Falls that the river is *marked:* "Past Usage for Logging." Thus, even this bit of weak and inconclusive evidence does not indicate that the river *from Spokane Falls to* the Columbia, which includes the Little Falls stretch, was *ever used* for floating logs. In fact the marking on the map indicates that "Past Usage for Logging" stopped at Spokane Falls. Thus the conclusion is obvious that there was no "Past Usage for Logging" from Spokane Falls to the Columbia. Furthermore, the mere marking on the map above Spokane Falls is insufficient to prove the requisite navigability because of a lack of any indication as to when this stretch of the river was used "for logging." This map does not constitute probative evidence as to the time of year that "logging" occurred or as to whether it was limited to times of high water.

(3) Exhibit No. 127 is a 1958 pamphlet entitled "Sawdust Empire" (J.A. 736- 39). The pamphlet recites that a "sawmill [was] erected ... [in 1873] on the banks of the Spokane River near the falls ... was not successful, for the saws could not cut through the large logs that were floated down the River...." (R. 1197-1201, J.A. 738). Again, this

(continued...)

[21](...continued)
1958 publication lacks any reference to the *time* the logs were floated down the river. There is no indication as to the time of year that the logs were floated.

(4) Exhibit No. 129 *allegedly* "contains an 1884 newspaper account of a log drive down the Spokane River to Spokane Falls" (R. 1209, J.A. 747). This claim at page 24 of the Commission's brief is bizarre. It claims that its assertion of navigability is supported by a newspaper story in a Spokane newspaper of June 30, 1884 reporting that a "Tom Johnson was drowned today while driving logs a *couple of miles* from Fort Couer d' Alene, on the Spokane River" (J.A. 747) (emphasis added). But Fort Couer d' Alene was built in 1878 on a "thousand acres *near the outlet*, where the lake [Couer d' Alene] drains into the Spokane River. Much of this thousand acres is *now within the boundaries of the City of* Couer d' Alene" (J.A. 733). Couer d' Alene is *in Idaho* about 12 miles *east* of the Washington state line. Thus, one driving logs *"a couple of miles"* from the Fort would clearly be in Idaho and most likely east of Post Falls, Idaho. The river above Post Falls was always recognized as navigable, but only within Idaho, and Johnson's drowning does not indicate interstate navigability. The newspaper's statement that Tom "has a brother in Helena, Montana" (J.A. 747) is insufficient to support the necessary interstate element for the log traffic.

(5) Exhibit No. 128 (R. 1202-07, J.A. 741-46) is an opinion, 50 Fed. 429, by a U.S. District Judge, Circuit Court, D. Idaho, of April 9, 1892, from which the Commission's brief quotes the statement that the "Spokane River is of sufficient size and of such a channel as to be held

(continued...)

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[21](...continued)
a public highway" (R. 1207, J.A. 746). But this is *not* the holding by the Court. The opinion continues, but the Commission brief omitted the following significant statement: *"If this indication is confirmed by a full production of the facts,* its waters must so far flow unfettered that they may be utilized by the public for transportation purposes" (J.A. 746). The omission is telling and adverse to the Commission's contention.

This was a case *in Idaho* which sought an injunction against one Post from placing obstructions in the Spokane River that prevented floating down the stream a lot of logs it *"now"* has just above such obstructions. Since the date of the opinion of the District Judge was *April 9,* 1892 its reference to "now" is another indication of high water time (J.A. 742). The judge also stated: "The facts are not fully before me ..." (J.A. 743) and that: "It is unnecessary to discuss the old English rule and definition of a navigable stream" (J.A. 746). He did state that the "Spokane River is of sufficient size and of such channel as to be held a public highway" (R. 1207, J.A. 746), but he was obviously speaking of the river in Idaho above Post Falls. That short stretch of the River in Idaho was always considered to be navigable, but only from the lake to Post Falls, *in Idaho.*

(6) The Commission brief also cites a statement in Exhibit No. 133. This is a publication entitled "American Lumberman" which reports that on August 25, 1900, *a United States Marshal* "handed down a decision" that the Spokane River was a navigable stream (R. 1217, J.A. 756). The exact quotation is:

(continued...)

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[21](...continued)

> In the case of complaint against the Spokane & Idaho Lumber Company for violating the federal statutes in allowing sawdust and other refuse to enter the Spokane river, a navigable stream, the United States marshal has handed down the following decision:
>
> "That the defendant did allow refuse and other material to enter the river from its mill."
>
> "That the river is a navigable stream."
>
> "And that the defendant has violated the statute when it threw this refuse in a navigable river, whether it obstructed navigation or not."
>
> The decision is subject to review by a *higher court* ...

(J.A. 756) (emphasis added). This does not indicate whether the mill was in Idaho or Washington, and there was no indication where the sawdust was dumped. Likewise, it is not presently considered that the statement of the Marshal is equivalent to a court decision (J.A. 756).

The foregoing sets forth all the evidence that the brief of the Commission asserts in support of its claim that the Spokane River was a navigable water of the United States. The probative effect of the official Reports of the Army Engineers that the Spokane River was *never* a navigable waterway of the United States far overshadows the foregoing claims to evidence advanced by the Commission. The Commission's contention that the foregoing evidence supports its claim is obviously deficient.

In contradistinction to the deficient evidence of navigability that the Commission advances, the Report of the Army Corps of Engineers on the navigability of the Spokane River even as late as 1932, as quoted and described above, constitutes substantial *evidence* that the entire length of the Spokane River was *not* a navigable river of the United States prior to the completion of Grand Coulee Dam in 1942 (J.A. 765), *see also* Reports of Army Engineers itemized in n. 20, *supra*.

Our above description of the Commission's excursions in search of evidentiary support, some outside the record, and all constituting data of dubious probative value, demonstrate the tenuousness of the Commission's conclusions on navigability. *See also* 25 F.E.R.C. ¶ 61,002 at 61,027 (Butler, Chrmn., dissenting). The Commission's

de novo review reaches the height of absurdity, however, when it holds that the Spokane River has *always* been navigable because only one improvement was necessary to make it so, that is, the construction on the Columbia River of the Grand Coulee Dam, the largest concrete structure in the world.[22] One of the great engineering marvels of this century, the Grand Coulee Dam created a 51-mile long lake in the Columbia canyon and backs water 29 miles up in the canyon of the tributary Spokane River to the tail race below the Little Falls development. 29 F.E.R.C. ¶ 61,002 at 61,003.

The Commission apparently views this immense project as the sort of "artificial aid" to navigation to which the Supreme Court referred in *United States v. Appalachian Electric Power Co.*, 311 U.S.

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[22] Guinness Book of World Records 269 (1981).

377, 61 S.Ct. 291, 85 L.Ed. 243 (1940). 25 F.E.R.C. ¶ 61,002 at 61,005. This is implausible. *Appalachian* limited the situations where a river is susceptible to being made navigable given "a balance between cost and need at a time when the improvement would be useful." 311 U.S. at 407-08. The Grand Coulee Dam was not an improvement that was *reasonable* in cost and need to make the Spokane River navigable. The cost was extraordinary and the improvement of the navigability of the Spokane river was minimal—only from the confluence with the Columbia to the tail race *below* the Little Falls Development. As to the reasonableness of the cost, *Mason Co. v. Tax Comm'n,* 302 U.S. 186, 192, 58 S.Ct. 233, 236, 82 L.Ed. 187 (1937), recites that the Grand Coulee project, as originally contemplated by the War Department and the Department of the Interior, included a dam at Grand Coulee

to be 370 feet high above low water (550 feet high as actually constructed)[23] and 4,290 long on the crest, a power plant to develop 2,100,000 horsepower at a contemplated total cost of $392,000,000 in depression dollars. It created a lake 51 miles long and stored over 5,000,000 acre feet of water. Improving navigability on the Spokane River was one of its very minor purposes.

[15] While the Grand Coulee Dam did create a navigable lake, it is absurd to suggest that it is the sort of "artificial aid" that would retroactively convert the entire Spokane River into a navigable water of the United States back to a time when dams were constructed with the aid of mules and man-operated wheelbarrows. Such theory would make practically all streams navigable; the gnarliest rivulet in the

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[23] The Washington Monument is 555 feet high. World Book Encyclopedia.

Rockies might be made to accommodate pleasure craft if the energy and enormous capital outlay it took to build Grand Coulee were devoted to the task. The Supreme Court was not so obtuse as to miss this problem in deciding *Appalachian*. Thus the Court in *Appalachian* wrote, "The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree." 311 U.S. at 407, 407 n. 26. Navigability must be achieved at a *reasonable cost*. The "contemplated" cost of $392 million in depression (1933) dollars, is not a "reasonable cost" to make the tributary Spokane River navigable only from its mouth to Little Falls. We may safely conclude, following the *Appalachian* Court, that as a matter of degree the Court did not mean to include concrete works of titanic proportions (550

feet high and 4,290 feet long)[24] involving "high engineering skill and the expenditure of vast sums of money" as reasonable improvements to navigability. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699, 19 S.Ct. 770, 773, 43 L.Ed. 1136 (1899); *Appalachian,* 311 U.S. at 408-09, 61 S.Ct. at 299-300.

[16] At all times relevant to this case the Spokane River was *not* navigable. It was properly found *not* to be navigable by those to whom that duty was assigned and the evidence of the physical features of the river as described in all the Army Engineer's reports over half a century, see n. 20, *supra,* are convincing probative evidence of the fact that it was not navigable in fact when the Little Falls development was constructed. Thus, under

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[24] *Mason Co. v. Tax Comm'n,* 302 U.S. at 192, 58 S.Ct. at 236, *supra.*

the terms of the 1905 Act Washington Power and Wilson were authorized to construct the Little Falls development without obtaining the approval of the War Department or Chief of Army Engineers, since it could not be anticipated, some thirty years before the fact, that the largest concrete dam in history would someday flood the lower reaches of the Spokane River Valley to the tail race below Little Falls and make navigable a part of a stream that was formerly all but impassable by canoe.

The Commission's failure to give adequate deference to the 1932 Army navigability report and all its earlier reports, *see* n. 20, *supra,* is further shown in its selective reading of Exhibit 159 (the 1893 report on navigability). This reading by the Commission, however, does no more to support its finding of navigability than does its viewing Grand

Coulee as a reasonable navigation aid. The *conclusion* of the 1893 report was that the river was *not* navigable, 25 F.E.R.C. ¶ 61,002 at 61,024 n. 9, and to use that report in the selective manner the Commission does in its attempt to support the conclusion of navigability is to contradict its own evidence and make a mockery of the deference properly owed to the authoritative findings on the river's navigability at the times relevant to this case.

Even if there were something to the Commission's bizarre route through the navigability question, it neglects the doctrine that a river may be found to be navigable in part and nonnavigable in part. *United States v. Utah,* 283 U.S. 64, 89-90, 51 S.Ct. 438, 445-46, 75 L.Ed. 844 (1931). Insofar as this case is concerned the authoritative findings by the Army Engineers are controlling: "Below Spokane,

the river is not and never was navigable except for short stretches...." Ex. 87, April 29, 1932. And Congress *never* found it necessary to consent to the erection of any of the many bridges over the river. No substantial evidence contradicts these conclusions or the facts upon which they are based. There is nothing in this record which suggests that when the Little Falls dam was erected it obstructed a navigable portion of a navigable river of the United States, even if some intrepid lumberjacks did manage, *during high water* some 65 to 45 miles upstream from Little Falls, to float some logs down a short stretch of the river.

At the present time, that part of the Spokane River from the Little Falls Development to the Columbia is now recognized as navigable by the Army Corps of Engineers (J.A. 634-35). This was due to the completion of the Grand Coulee Dam

as we note above. 25 F.E.R.C. ¶ 61,002 at 61,003. Thus the Commission would have jurisdiction to license any *new* structures built on the now *navigable* portion of the River under the Federal Power Act. It cannot, however, expunge the fact and the determinations that the river was *not* navigable when the Little Falls development was authorized and constructed, and by so doing evade the provision of section 23 of the Federal Power Act that none of the "provisions" of the present Act shall "be construed as affecting any permit or valid existing right of way ... granted [before June 10, 1920] ... or as affecting any authority ... given pursuant to law [before June 10, 1920]." § 23(a), *supra*.

The Commission claims reliance on our earlier decision in *Pennsylvania Water & Power Co. v. FPC*, 123 F.2d 155 (D.C.Cir.1941), *cert. denied*, 315 U.S.

806, 62 S.Ct. 640, 86 L.Ed. 1205 (1942), for the proposition that an operator of a hydroelectric project could not rely on a previous holding in 1904 of nonnavigability by the Secretary of War under the Rivers and Harbors Act with respect to *another project* in Maryland (a bridge on the same river), as implied consent for the erection and maintenance of the company's structure in Pennsylvania. The *Pennsylvania* case involved a 1938 order by the Federal Power Commission that the Power Company obtain a license under section 23 of the Federal Power Act for its power dam built between 1905 and 1909 (FPC Brief, p. 5) in the Susquehanna River near Holtwood, Pennsylvania. As set forth below our decision in *Pennsylvania* is clearly distinguishable on the facts, and is not precedent on the issues raised with

respect to the development at Little Falls.

First, the court in *Pennsylvania* found that the evidentiary record going back to 1797 supported the Commission's finding that the Susquehanna *was* a navigable river of the United States when the Holtwood Dam was constructed, while the evidence here with respect to the Spokane River is that it was *not* a navigable river of the United States, when the Little Falls Dam was built.[25]

Second, the Holtwood dam was not built on a "valid" right of way because the provisions of section 9 of the Rivers and Harbors Act of 1899 were fatal to Pennsylvania's claim and the Company could point to no statutory authority. Section 9 provided, *inter alia:*

> that such structures [dams] "may be built under authority of the

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[25] *See* discussion at p. 326, *supra.*

> legislature of a state across rivers ... the navigable portions of which lie *wholly* within a single state, *provided* the location and plans are submitted to and approved by the Chief of Engineers and the Secretary of the Army before construction commenced....

33 U.S.C. § 401 (emphasis added).[26] The Company contended that the Susquehanna was not a navigable river of the United States but was *only* navigable within Pennsylvania. It had never submitted the location and plans for the dam for the statutorily required federal authority. In

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[26] The court sustained the FPC's ruling that the Susquehanna at the location of the dam was a navigable water *of the United States* despite a ruling in 1904 by the Secretary of War that the river was only navigable in one state, i.e., Pennsylvania, and that the Pennsylvania Railroad therefore had a right to build a bridge over the river at Havre de Grace, Maryland. However, no authorization was ever obtained from any federal official to build the Holtwood Dam and there was no special act of Congress authorizing such construction. The Little Falls development is distinguishable on both grounds--(1) the Secretary of the Interior authorized the project, and (2) the authorization conformed to a special Act of Congress.

thus admitting that the dam was erected in waters that were navigable *"within a single state,"* i.e., *Pennsylvania,* given the requirements of section 9, the company was hung by its own theory. Here, however, the record reflects that the Little Falls dam was not erected in any waters that were navigable within Washington. Even if they were, there is considerable force to the argument that Congress in its *special* Act of March 3, 1905, applicable *only* to the Spokane River along the southern boundary of the Spokane Indian Reservation, had provided a complete alternative to section 9 of the Rivers and Harbors Act and compliance therewith was all that was required to establish the *"valid* ... right-of-way" required by section 23.

Third, the Pennsylvania Power Company was never "granted ... any ... right-of-way [or] ... authority" by any

federal authority, such as Wilson and Washington Water obtained here by the consent, grant and authorization from the Secretary of Interior in accordance with the 1905 Act. Hence the Pennsylvania Power Company was not entitled to the exemptions in section 23 which are available here to Washington Power and which are fatal to the Commission's contentions. It follows that the decision in *Pennsylvania Water & Power Co.*, has no application to this case because the Little Falls development satisfies the section 23 conditions for exemption, and the Spokane River at Little Falls was *not* shown at the relevant times to have been on a *navigable* stretch of the river, interstate or intrastate.

In *Pennsylvania,* this court, citing *Newport & Cincinnati Bridge Co. v. United States,* 15 Otto 470, 480, 105 U.S. 470, 480, 26 L.Ed. 1143 (1881), held that "the supervision and control by Congress of

navigable waterways 'is continuous in its nature' and no part of this power and supervision 'will be presumed to have been surrendered unless it was manifestly so intended.'" 123 F.2d at 162. This case would support the Commission insofar as it relies on the decision to support its jurisdiction over any *new structures* proposed for stretches of the Spokane River that are "navigable waters of the United States."[27]

The rights acquired by Washington Power from Wilson and approved by the Secretary of Interior were not conditioned, however, on the river remaining nonnavigable, nor are the exemptions in section 23 so conditioned. In fact, when enacted, they expressly

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[27] Similarly *Montana Power Co. v. FPC*, 185 F.2d 491 (D.C.Cir.1950) is completely distinguishable because the Commission had before it in that case substantial evidence that the Missouri River in the relevant section was navigable. *Id.* at 494-97. That is not the case here.

related to, and were limited to, rights *validly* acquired in the past—"pursuant to law." § 23(a). This is an obvious reference to *law* existing at the time the permit or right of way was granted or acquired. Congress in its continuous supervision of navigable waterways *could* have legislated that all projects occupying nonnavigable waterways of the United States would require licenses if the rivers they occupied subsequently became navigable, even if they did not need licenses before and had prior existing rights of way. But Congress did not take this course. It did just the opposite: It preserved all *valid* rights of way acquired by grant pursuant to law prior to June 10, 1920 against being "affected" by being required to obtain a license to operate. 16 U.S.C. §§ 816, 817.

If the Spokane River *had* been a navigable river of the United States in

1910, as it was not, the necessity for complying with the requirements of the Rivers and Harbors Act would have been in a different posture. But since the stream was not navigable at that time, the Rivers and Harbors Act was not violated by the construction of the dam, and the right of way was *validly* acquired under then existing law. Such jurisdiction as the Commission may have subsequently gained over the lower part of the stream by the erection of the Grand Coulee Project was subject to and limited by section 23 of the Federal Power Act.[28] FERC's authority

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[28] It is recognized that the Commission contends that the river was *always* navigable because all it needed was the Grand Coulee Dam to make a small part of it navigable. But that argument refuses to take into account then existing Supreme Court decisions, the engineering limitations existing around 1905 and that even when Grand Coulee became possible and was erected it was a more enormous improvement than could *reasonably* have been expected would be undertaken to make the Spokane River navigable at any relevant time.

under the Federal Power Act, by virtue of section 23, specifically excludes the compulsory licensing of existing power dams constructed under a "valid right-of-way" granted prior to June 10, 1920—valid means valid when acquired.

The Commission nonetheless boldly embarked on a belated excursion into the legislative history of the Federal Power Act of 1935 and its predecessor, the Federal Water Power Act of 1920, in the same spirit in which it undertook its purported historical investigation of the 1905 Act. Its study of the 1905 Act, which explicitly provided for the hydroelectric development of the Spokane River along the southern boundary of the Spokane Indian Reservation, attempted to show that the Act in fact did *not* authorize the construction of power dams. Its research into the Federal Power Act of 1935 similarly purports to demonstrate that its

exceptions do not mean what they say. *See* 25 F.E.R.C. ¶ 61,002 at 61,011. The Commission's theory as to section 23(b) is difficult to summarize and its logic is somewhat opaque. From the House and Senate reports, H.Rep. No. 1318, 74th Cong., 1st Sess. (1935) and S.Rep. No. 621, 74th Cong., 1st Sess. 1, 47 (1935), and language in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 424, 61 S.Ct. 291, 307, 85 L.Ed. 243 (1940), the FERC apparently means to infer, though its language is unclear, that the Federal Power Act and the Rivers and Harbors Act acting together prohibit the *maintenance or operation* of any dam on a navigable waterway without a license from the Commission, *even those that have pre-FWPA authority*. 25 F.E.R.C. ¶ 61,002 at 61,013.

The FERC's astonishing interpretation of section 23(b) would eviscerate the prohibition Congress clearly placed on any

authority the Commission possessed to "affect" valid existing rights of way, including those at Little Falls in this case. Section 23(b) of the Federal Power Act unequivocally states that "[i]t shall be unlawful for any person ... to construct, *operate or maintain* any dam ... in any of the navigable waters of the United States ... *except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920.*" Thus this exception in section 23 runs specifically to the construction, operation and maintenance of power dams. Yet in the face of this clear mandate, and the similar import of section 23(a), the Commission attempts to rely on the legislative history, and completely unpersuasive and not particularly ingenious history at that, to conclude that "the 1899 statute, in common with the 1935 statute prohibits ongoing operation

activities as well as initial construction activities." *Id.* This perverted construction converts the prohibition the statute imposes on the Commission into a prohibition on those who "operate or maintain any dam ... [on an] existing right-of-way granted prior to June 10, 1920." If that construction can be deduced from the applicable statutes then anything is possible.

[17] This is an egregious example of an attempt to rely on legislative history in order to circumvent the clear intent of Congress. There may be cases where it is unclear whether a given power development was in fact constructed and continues to be operated and maintained under valid pre-FWPA authority, or whether the statute authorizing construction gave complete authority, and thus whether the pre-1920 exception to the Federal Power Act applies to it. But this is not such a case. Where

the record discloses that a power development clearly *was* constructed by 1910 and has been operated and maintained continuously under complete and valid authority granted prior to the creation of the Commission, as the Little Falls development was and is, the statute clearly prohibits the Commission from construing the obligation retroactively to require subsequent licensing by the Commission.

That the Commission's jurisdiction does not extend to developments with valid pre-FWPA authority is absolutely clear from the plain language of section 23 of the Federal Power Act. In accordance with the provisions of the 1905 Act the Secretary of the Interior gave his "consent" to Wilson and Washington Water Power Company (the appropriators) acquiring "the right to the use of the waters of the Spokane River ... *by*

appropriation under and pursuant to the laws of the State of Washington"; and, in keeping with the purposes declared in the title of the 1905 Act, he granted the "appropriators land on said reservation ... for the erection of dams [etc.] ... for the development of power [and] for the beneficial use of said water." 33 Stat. 1006. The language of the 1905 Act, in providing "[t]hat the right to the *use* of the waters of the Spokane River ... may ... be acquired ... by appropriation under ... Washington [law]," *id.*, implicitly includes the right to construct a dam in the Spokane River at Little Falls as only by the construction of a dam was it possible for the waters of the River to be appropriated and beneficially used "for power purposes." *Id.*

In sum, the development at Little Falls "for power purposes and the

beneficial use of said water"[29] was constructed and operated in full compliance with the 1905 Act. There is no reasonable contention to the contrary. At that time, given the nonnavigablity of the river, there was no applicable federal or state law that required any further authority. Existing federal laws only required approval of dams and obstructions in streams that were *navigable,* interstate or intrastate. Thus, it cannot be substantially questioned on this record that the Secretary's consent and grant, which included the "right-of-way" for the statutorily stated purposes, was "valid," and it is the "right-of-way" for the purposes granted that is protected and which the Commission illegally seeks to *"affect."* Given the title and provisions of the Act that refer to the "erection of

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[29] Title of 1905 Act.

... dams ... for the development of power"[30] it is clear that the Act did authorize the "erection" of dams, etc., for the appropriation of water for power purposes. The incorporation into the 1905 Federal Act of the water laws of the State of Washington, under which riparian owners on nonnavigable streams had the right to build dams to appropriate water rights, in effect empowered the Secretary of the Interior, by his "consent" to acquiring water rights by appropriation under Washington law, to authorize the erection of dams, etc., on reservation lands granted to an appropriator. It is also

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[30] *Id.*, Sec. 2. We have considered the Commission's argument that it may base jurisdiction on the coordination of the Little Falls development with other developments over which FERC has jurisdiction. Since we have found that Washington Power has a valid right of way that may not be "affected" under the FPA 23(a) and (b) exception, the coordination argument is without merit. We have considered the Commission's remaining arguments and find them without merit.

apparent that the Secretary correctly interpreted the 1905 Act as requiring his authorization to "erect the dam," which was given. There was no federal power act in effect prior to 1920. The Company therefore had both complete authority to build the dam at the time of construction and the valid right of way for that purpose granted before June 10, 1920, which is all that is required for the section 23 exception to apply.

The appropriation, construction and maintenance complied with the terms and conditions of the 1905 Act, and section 23 of the Federal Power Act prohibits the Commission from doing anything that would "affect" the rights so acquired. The Chairman of the Commission remarked on the "extraordinary lengths" to which the Commission reaches in its attempt to "extend its jurisdiction over Little Falls Dam." 25 F.E.R.C. ¶ 61,002 at 61,027

(Butler, Chrmn., dissenting). Indeed, one can hardly avoid the impression that the Commission, determined to seize jurisdiction over the property of the Washington Water Power Company, simply decided not to let the expressed intent of Congress stand in its way. We cannot countenance such a gross misconstruction of the statute.

VI. CONCLUSION

It is concluded that: (1) The Washington Water Power Company by appropriation acquired the water rights and the lawful right of way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and now owns the rights, title, interests, authority and right of way necessary for the construction, operation and maintenance of the Little Falls Power Development; (2) prior to June 10, 1920 such rights, etc., were acquired

and granted in accordance with the special Act of March 3, 1905 (33 Stat. 1006) and the laws of Washington made applicable by such Act; (3) the continuous operation and maintenance of the Little Falls Power Development by the Washington Water Power Company is exempted from the application of the Federal Power Act by sections 23(a) and (b), 16 U.S.C. §§ 816, 817, of said Act; (4) Commission Opinions Nos. 117 and 117-A and Orders pursuant thereto, are in violation of section 23 of the Federal Power Act, are invalid to the extent that they seek to require the Washington Water Power Company to apply for and obtain a license for the continuous operation and maintenance of the Little Falls Power Development, and therefore are reversed to such extent. The case is remanded to the Federal Energy Regulatory Commission for further action not inconsistent with this opinion.

Judgment accordingly.

MIKVA, Circuit Judge, dissenting:

Despite the majority's extensive and complex opinion, the questions in this case are quite straightforward. Section 23 of the Federal Power Act, 16 U.S.C. §§ 816-817 (1982) (FPA or Power Act), states that no person may operate a dam on navigable waters of the United States without being licensed under the FPA. There is an exception to this requirement: a person need not be licensed if he obtained a right-of-way to build the dam before the FPA became effective in 1920.

Petitioner Washington Water Power Company (Washington Power or the Company) operates a dam at the Little Falls section of the Spokane River in Washington state. The Company claims that it is not required to obtain a license under the FPA for two reasons. First, it contends that the

Spokane River was not navigable at the time the dam was built (1908-11), and so the FPA by its terms does not apply. Second, Washington Power argues that even if the FPA is applicable, the dam was built pursuant to a valid right-of-way given by a special statute in 1905 (the 1905 Act). (The Company bought the right-of-way from David Wilson, the original grantee under the 1905 Act). This, the Company claims, brings it within the exception outlined in § 23 of the FPA.

The Federal Energy Regulatory Commission (FERC or the Commission) rejected these arguments and ordered the Company to apply for a license. *Washington Water Power Co.*, 15 F.E.R.C. (CCH) ¶ 61,039 (1981). The Commission also rejected Washington Power's claim that FERC was barred from imposing the license requirement by collateral estoppel.

In deciding whether to uphold the Commission's decision that the Little Falls dam should be licensed, this court must answer three relatively simple questions. First, is Washington Power beyond the jurisdiction of the Commission and the Federal Power Act if the Spokane River was not navigable at the time the dam was built? Second, did the right-of-way given to the Company by the 1905 Act include the right to build a dam? Third, is FERC now barred by collateral estoppel from requiring Washington Power to apply for a license?

Because I believe that all these questions should be answered negatively, I would uphold the FERC decision.

A. *Scope of the Federal Power Act*

The first question is whether the FPA applies to the dam on the Spokane River at all. There is no question that the river is now a navigable waterway. The majority,

however, feels that because it was not navigable when the dam was built (I will assume, *arguendo,* that this is true), or in 1920 when the FPA was passed, that the Little Falls project is not covered by the terms of the Power Act. This approach has two flaws: it is an overly restrictive interpretation of the statute's scope, and it ignores the other sections of the FPA that give the Commission jurisdiction.

The majority undertakes an exhaustive examination of the evidence as to whether the river was navigable either when the dam was built or when the Power Act was passed. I think this discussion misses the point; the case law in this circuit makes it plain that FERC's jurisdiction is not as constrained as the majority assumes. In *Pennsylvania Water & Power Co. v. Federal Power Commission,* 123 F.2d 155, 162 (D.C.Cir.1941), *cert. denied,* 315 U.S. 806, 62 S.Ct. 640, 86 L.Ed. 1205 (1942), a

dam owner on the Susquehanna River refused to apply for a statutory permit to continue his operations. He argued, *inter alia*, that he had built the dam in reliance on the Secretary of War's determination that the river was not navigable. After finding that the river was currently navigable, the court said that the Commission's control over the nation's waterways was "continuing in nature," adding "[i]t cannot be considered, we think, that Congress [in § 23 of the FPA] meant to allow existing obstructions to continue unregulated in the navigable streams of the United States." *Id.* at 162, 163. Because it is conceded by all parties in this case that the Spokane River is navigable today, *see* maj. op. at 332, an earlier finding of non-navigability will not defeat the Commission's jurisdiction under the Power Act.

The majority's attempt to distinguish *Pennsylvania Water* by saying that FERC's jurisdiction will only reach *new* projects on the Spokane River is unpersuasive. It ignores the language of § 23 which says that a person may not build or *maintain* a dam on a navigable river without a license. Because the Spokane is now navigable, the dam at Little Falls must be maintained in compliance with the statute, despite any earlier findings of non-navigability. The majority's effort to restrict jurisdiction to a previous state of nature is as antediluvian as it sounds. Such a concept would make it impossible for Congress to protect and regulate our inland waterways, because many portions of such waterways at one time or another were non-navigable. This parsimonious measure, given the grand design of a national system of waterways, treats our rivers as if they were backyard wading pools.

Even if the river's current navigability did not give the Commission jurisdiction, there are independent grounds for finding that the Power Act applies. Section 23(b) of the FPA gives FERC jurisdiction over a dam or electric facility if it is on "any part of the ... reservations of the United States." 16 U.S.C. § 817 (1982). *See Federal Power Commission v. Oregon,* 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955) (acts relating to water appropriation do not limit Commission's right to license water power project on government reservation). A "reservation" is defined by § 3(2) of the FPA to mean any interest in land owned by the United States. 16 U.S.C. § 796(2) (1982).

In this case there is no dispute that the United States has a reversionary interest in the land along the north bank of the Spokane; Washington Power has title

to the land *for so long as* it is used for generating electricity. *See* 15 F.E.R.C. (CCH) ¶ 61,039 at 61,070-71. Should the Power Company stop using the land for this purpose, title would revert to the government. This is *not,* as the majority suggests, a determination that Washington Power no longer has good title to the land. It only means that the government has a reversionary interest in the event of non-use, and that this interest gives FERC jurisdiction.

A final reason that the FPA applies to petitioner's dam is that it operates along with other, licensed projects to form an "integrated unit of development." It is well settled that the Commission may license projects, even those on non-navigable rivers, if they affect interstate commerce. *Federal Power Commission v. Union Electric Co.,* 381 U.S. 90, 85 S.Ct. 1253, 14 L.Ed.2d 239 (1965).

There was testimony before the Administrative Law Judge below that strongly supports the notion that the Little Falls dam is part of a larger network of generating plants that sells power both intra- and interstate. One witness testified, for example, that the Company controlled water releases from the entire Spokane River development to enhance the generation at Little Falls. *See generally Washington Water Project*, 48 F.P.C. 339, 340 (1972). Congress's powers over interstate commerce are broad enough that FERC may license all projects that affect it, whether the river is navigable or not. *See Niagara Mohawk Power Corp.*, 4 F.E.R.C. (CCH) ¶ 61,009 (1978) (eight projects licensed as one unit).

The majority's response to these bases for jurisdiction is to dismiss them with the wave of its hand. In a footnote it says that because a finding that the

Power Act applied in this case would "affect" the Company's rights (which is prohibited by FPA § 23(a)), that the statute must not apply. Maj. op. at 63 n. 30. But this argument is logically flawed: it assumes that the Commission may not require the Company to obtain a license; since Washington Power does not have to obtain a license, any change requiring it to do so would "affect" its right-of-way; therefore (the reasoning goes) the Company must not be required to obtain a license, and so the FPA must not apply. But if, as I suggest below, the Company was *not* granted a right to build a dam by the 1905 Act, then FERC jurisdiction cannot be defeated on the ground that requiring a license would affect the Company's rights. In fact, *not* to require a license would *enlarge* the rights now enjoyed by Washington Power; this is also prohibited by § 23(a).

Whether the 1905 Act did or did not grant the right to build a dam is a separate question from whether the Federal Power Act applies in the first instance. Whether FERC has jurisdiction under the Power Act cannot be determined by begging the question of petitioner's rights, and then rejecting all claims that would somehow affect those rights.

Because FERC has continuing jurisdiction over the nation's rivers, because part of the Little Falls project is on a United States reservation, and because the dam is part of a network that affects interstate commerce, I believe that the Federal Power Act applies to this case. So the crucial question becomes whether the Little Falls project fits within the exception to the licensing requirement: specifically, did the 1905 Act include the right to build a dam?

B. *The 1905 Act*

If the 1905 Act gave the right to dam the river, then petitioner is not required to obtain a license under § 23(b) of the Power Act. This subsection provides that no license is required if a person operates a dam in accordance with a valid right-of-way granted before 1920, the year the FPA went into effect.

We begin with the language of the Act. The 1905 Act gave the grantee the right to "use" the waters of the Spokane. Depsite the majority's assurances, I am not convinced that the plain meaning of "use" includes the right to build a dam. "Use" could mean "consume *and* occupy" the river waters, in which case a dam would certainly be included; on the other hand it could just mean "consume." The majority repeatedly points out that the purpose of the statute was to encourage electric power production, but this does not mean

a fortiori that a dam was intended. As FERC noted in its opinion below, not all hydroelectric projects involve obstructing the river. 15 F.E.R.C. (CCH) ¶ 61,039 at 61,078 n. 18. Creation of obstructions was normally discouraged in river legislation, and it is not as clear to me as it is to my colleagues that the Act on its face gives a grantee the right to construct a dam.

Because the language of the statute is ambiguous, we turn to the legislative history. *Allen v. State Board of Elections,* 393 U.S. 544, 570, 89 S.Ct. 817, 834, 22 L.Ed.2d 1 (1969). Although determining congressional intent is always an imperfect science, the fruits of the search are very specific in this instance. The *precise* question we face was asked and *emphatically* answered during the debate in Congress. As the majority notes, the following exchange took place:

> Mr. Dalzell: How is the water power to be used, by dams in the river?
>
> Mr. Jones: They will *probably* dam the river. This is a matter they are willing to take care of *at some future time*....
>
> Mr. Dalzell: From what committee is this bill reported?
>
> Mr. Jones: From the Committee on Indian Affairs. It simply affects Indian lands and provides means by which persons can acquire the permanent rights.
>
> Mr. Lovering: *Does it carry the right to dam the river?*
>
> Mr. Jones: *Oh no, not at all*. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.

39 Cong.Rec. 2413 (1905) (emphasis added).

I do not know how the legislative intent could be clearer. The drafter of the bill, Mr. Jones, gave an unqualified answer to a very specific question—the

1905 Act does not give the right to construct a dam.

The majority strives mightily and unsuccessfully to twist the above language into something else. It speculates that when Mr. Lovering asked "Does it [the Act] carry the right to dam the river?", he actually meant to say "Should this bill be considered by the Committee on Interstate and Foreign Commerce?" Maj. op. at 316-17. Its reasoning is that Mr. Lovering inquired about the proper committee because the Commerce Committee had jurisdiction over *navigable* waterways. Why this question should be asked (and why in this form) when only moments before Mr. Jones had said that the water was not navigable (and therefore did not have to be considered by the Commerce Committee), should cause the majority some problems.

The court also finds an irreconcilable conflict between the plain

meaning of the statement that the bill gives no right to construct a dam, and Mr. Jones' earlier statement that "[t]hey [the grantees] will probably dam the river ... at some future time." To my mind the two statements are perfectly consistent. All the parties involved expected that whoever received the right to use the water would probably dam the river eventually. But the right to do so was not included in the bill; therefore, it is a matter the grantee would have to take care of "at some future time." If the grantee or his assignee did wish to build a dam later, he would have to get specific permission from Congress; because the 1905 Act did not give this right, "[t]hey would have to take their chances on that."

This interpretation gives the simple, obvious meaning to everything the Congressmen said. It is also consistent with the general rule that grants should

be construed strictly in favor of the public and against the grantee. 3 C. Sands, *Statutes and Statutory Construction* § 60.02 at 81, § 64.05 at 120 (4th ed. 1974).

Once the proper meaning is given to the legislative history, the rest of the majority's rationale loses much of its force. The court makes much ado, for example, about the effect of state law on the 1905 Act. The majority takes pains to point out that water needed to be appropriated under Washington law, and that Wilson, the original grantee, carefully took all the necessary steps. These points are not in dispute. There is no question that Wilson validly obtained *all of the rights given* by the 1905 Act. The question remains, though, as to the extent of the rights granted. Because only Congress could give permission to dam the waters on a federal reservation, the

grantee's compliance with state law only means that he received everything that the state could give him.

The fact that the Interior Secretary interpreted the statute to include the right to build a dam does not change the analysis. When the intent of Congress is as clear and unqualified as it is here, the actions of an enforcement officer cannot be allowed to override it. *Morton v. Ruiz,* 415 U.S. 199, 237, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974) (courts should not defer to agency interpretations that are inconsistent with congressional purpose); *ITT World Communications, Inc. v. Federal Communications Commission,* 725 F.2d 732, 741 (D.C.Cir.1984) (agency construction of statute should be accepted unless inconsistent with obvious congressional intent). It is ultimately for this court to decide what statutes

mean, consistent with the legislative intent.

The common-sense interpretation of the 1905 Act does not, as the majority believes, make the statute void. Nothing in the Federal Power Act affects the right-of-way that *was* granted: the right to use the water and adjoining land. But because the legislative history makes it crystal clear that the Act did not give the right to construct a dam, FERC now has the authority to require that Washington Power obtain a license to operate the Little Falls project.

C. *Collateral Estoppel*

I also do not think that the Commission is collaterally estopped in this case. Petitioner relies on *United States v. Big Bend Transit Co.*, 42 F.Supp. 459 (E.D.Wash.1941), to support its claim that the government is precluded from asserting that the 1905 Act only gave the

right to use the water, not to dam it. In *Big Bend* the court assumed without actually deciding that the 1905 Act gave the respondent utility the right to build a dam. The Power Company argues that this case bars the government, through FERC, from relitigating the question.

The policy behind the doctrines of res judicata and collateral estoppel is to prevent relitigation of issues that were, or should have been, previously tried. *See* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4403 (1981). One reason for this preclusion is to keep a party from being forced to go through the trouble and expense of relitigating a point it has already won. *Id.*; *United States v. Mendoza,* 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984). Although there is no longer a firm requirement of mutuality of parties between the two suits, *Allen v. McCurry,*

449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), a litigant seeking to invoke collateral estoppel must still show that

(1) the issue must have been actually litigated;

(2) the issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial; and

(3) preclusion in the second trial must not work an unfairness.

Jack Faucett Associates, Inc. v. American Telephone and Telegraph, 744 F.2d 118, 125 (D.C.Cir.1984), *cert. denied,* — U.S. —, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985), citing *Otherson v. Department of Justice, INS,* 711 F.2d 267, 273 (D.C.Cir.1983).

The points to be made in favor of collateral estoppel do not satisfy this three-part test. Although the *Big Bend* court obviously believed that permission to build a dam was included in the 1905 Act, 42 F.Supp. at 468, this determination

was not necessary to the holding of the case. The court simply decided that in a condemnation proceeding, the value of the land along the Spokane included the value of the rights granted by the 1905 Act. Whether the right to construct a dam was included in the compensation owed to the land owner does not affect the question of whether the land should be valued for its potential as a power site, or for its current agricultural use. Because the question before us was not necessarily decided by the *Big Bend* court, collateral estoppel does not apply.

It also would be unfair to preclude a discussion of the main issue in this case. Although the United States was a litigant in the previous suit, and is present here through FERC, in fact the real party in interest is the Spokane Indian Tribe. It was the Indian Tribe that originally raised the argument that the Little Falls

dam should be licensed in the proceedings below. Because the Indian Tribe did not have a chance to litigate the issue in *Big Bend*, it would be unfair now to bar the Tribe from fully pressing its claim.

CONCLUSION

I would affirm the Commission's decision to require the Power Company to apply for a license for the Little Falls project. The words of the statute—the right to "use" the river—are ambiguous enough to justify an examination of the legislative history. This history makes it so clear that the right to dam the river was *not* granted by the 1905 Act, that the majority's attempt to muddy the waters is a mystery. Our proper concern about excessive reliance on legislative history when the congressional intent is vague should not overwhelm us when the intent is clear. Because I think the majority has

changed the intended meaning of the 1905 Act, I dissent.